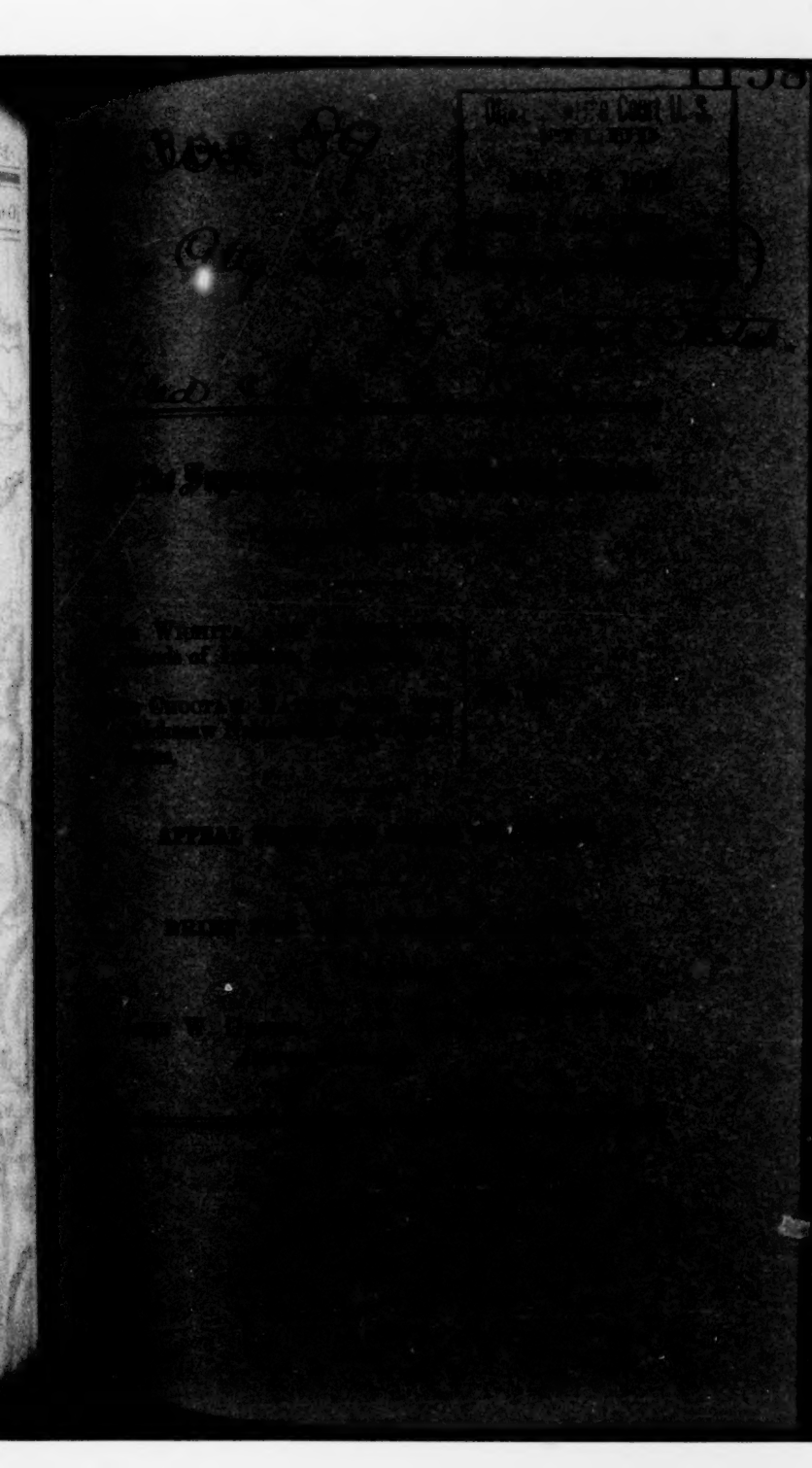

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE WICHITA AND AFFILIATED Bands of Indians, appellants,
v.
THE CHOCTAW NATION AND THE Chickasaw Nation and the United States. } No. 338.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case, like cases Nos. 337 and 339, arises under the act of March 2, 1895, § 1 (28 Stats., 876, 894–899), referring to the Court of Claims the claim of the Choctaws and Chickasaws to a certain tract of land known as the Wichita Reservation, and also the claim of the Wichita and affiliated bands of Indians to compensation in the event of the sale, by the United States, of the balance of

the land in the said reservation, over and above a certain area to be allotted to the Indians of the Wichita and affiliated bands in severalty. This Wichita Reservation is a portion of a larger district, commonly known as the Leased District, which was first leased and afterwards ceded to the United States by the Choctaws and Chickasaws by certain treaties.

The Wichita and affiliated bands were, as will be seen below, placed on a portion of this reservation by the United States in 1859, and they were afterwards allowed to occupy the whole of it. The Wichitas, however, base their claim upon their history, which may be summarized as follows:

The Wichita tribe of Indians, called in their own language Kitikitish, by the Spaniards Taovayase, and by the French Ouachita and Panis Piqués (tattooed Pawnees), were, as far as records go, first met with by white men in 1688, when they lived on or near the Washita River, in Louisiana. (Rec., 94.) In 1700 they moved 20 leagues farther west. (Rec., 147.) In 1719 they, or a portion of them, were found on a branch of the Arkansas, apparently the Canadian, not far from its mouth, in company with members of five Texas tribes and some Caddoes from western Louisiana. (Rec., 155–158.) After a partial destruction of their tribe by the Chickasaws, the Wichitas withdrew to the Caddo country (Rec., 98), and in 1758–59 they joined other tribes in a war against the Spanish at San Saba and elsewhere in Texas. (Rec., 203.) De Mesières, in 1778, reported that the Taovayase nation occupied two villages on either bank of the Red River, near where three forks of that

stream unite, and to the west of a mountain, apparently the Cross Timbers. (Rec., 210.) They had occupied one or both of these villages at least as early as 1759. Fragoso, in 1788, reported finding the Tahuayase villages west of a mountain, but did not mention the river. (Ho. Ex. Doc. No. 21, 50th Cong., 1st sess., p. 49.) In 1805 the two "Panis or Towiache" villages, said to be called Witchita and Towaahach, were reported to be up the Red River, 800 miles (340 by land) above Natchitoches, in Spanish territory, about 50 leagues below where they had been 40 years before. (Am. State Papers, Ind. Affs., Vol. I, p. 723.) Similar reports were made by various persons down to 1817, inclusive; but in 1821 Major Long reported that the Osages had recently driven the "Pawneys of the Red River" from their homes, and that they had settled near the head waters of the Brazos or the Colorado. (Rec., 203.) In 1834 Dodge and Catlin found a "Toyash" village on the North Fork of the Red River, near Elk Creek, and were told that the people had come from the south. (Am. State Papers, Mil. Affs., Vol. V, p. 381.) They abandoned this village not long afterwards.

The Wichitas were a seminomadic people, building round, grass-covered huts, and cultivating the ground, but changing their location every few years. (Rec., 214.) They had horses, and hunted on the plains a large portion of every year. The word "Wichita" is said to be Osage for "moving about," "migrating." (Rec., 222.) In 1843 there was a Wichita village on Cache Creek, 30 miles from its mouth (Rec., 234), but it does not appear how many of the tribe lived there, nor for how long, and

they are shown to have lived in Texas for some years before the annexation. (Rec., 100, 102, 126, 133.) In 1847 their principal village was on the Big Wichita, and they had another village nearer the Brazos. About 1850 they went to Rush Creek, in the Chickasaw country, along with a few of the Caddoes, Keechies, and Wacoes, where they were in August, 1852. In 1857 some of them returned to Texas, and had a village near the mouth of the Big Wichita. In 1858 the Wichitas and those with them took refuge at Fort Arbuckle for fear of the Comanches, and in 1859 they were placed on a reservation in the northeast corner of the present Wichita Reservation. (See Indian Commissioner's Reports, 1847–1859.)

Besides the separate claim of the Wichitas, as alleged aboriginal owners of the country, the Wichita and affiliated bands collectively claim the country under promises alleged to have been made to them in 1859. The affiliated bands (Wacoes, Tawakonies, Caddoes, Ionies, Keechies, Penetethka Comanches, and some Delawares) numbered in 1891 about 885 persons, the Wichitas being then numbered at 175, but by later reports 153. The former are remnants of tribes which either originally belonged in Louisiana and Texas or wandered there a number of years ago. In 1854 they were placed on small reservations in Texas (except a few Caddoes, Keechies, and Wacoes, who were then with the Wichitas), but in 1859, on account of the hostility of the Texans, they were removed to a small reservation on the False Washita, partly within the present Wichita Reservation.

(See Indian Commissioner's Reports.) Since that date their history has been that of the Wichitas.

This settlement of the Wichita and affiliated bands within the present Wichita Reservation was made in pursuance of instructions issued March 30, 1859, by the Acting Commissioner of Indian Affairs to the superintendent within whose charge the "leased district" lay, as follows:

> Fix upon a suitable location for the Wichitas, and make such examination of the country as will enable you to determine upon the proper places for locating and colonizing the Texas and other Indians, which it is intended to place within the district. In carrying out this policy, the different bands, so far as they can not be united, are to be located upon distinct reservations, with circumscribed limits, containing only so much land as may be necessary for their actual occupancy and use. * * *
>
> So soon as it may be practicable and safe for the Wichitas to remove to their new location, you will require them to go there, giving them to understand that it is to be their permanent home, and that none of them must leave their reservations without the permission of the agent. The same understanding must be impressed upon the other Indians.

On September 20, 1859, the superintendent reported as follows:

> In pursuance of instructions from your office * * * I selected, in the month of June last, reserves on the Fausse Wachita River, near the old Kechai village, and about 40 miles northeast of the eastern extremity of the Wichita Mountains, in the river valley, on the south side for the Comanches

> and other Indians from Texas; and on the north side, between the river and Sugar Tree Creek, for the Delawares and Caddoes, heretofore affiliated with the Wichitas or Ta-wai-hash; and for the latter and the bands of Kechais affiliated with them, I selected a reserve on the Canadian, some 25 miles west of those on the Fausse Wachita. (Sec. of Interior's Rept., 1859, pp. 382–3; 533, 633.)

He further reported that, for reasons stated, he had included pasture land in these reservations, making them much larger than was needed for cultivation. Their aggregate area was 154,240 acres, that of the present Wichita Reservation being 743,610 acres.

During the rebellion the Wichita and affiliated bands took refuge in Kansas, but returned in 1867. In 1872 certain chiefs and delegates of the Wichitas and affiliated bands entered into the following agreement with the Commissioner of Indian Affairs:

> Articles of agreement made and concluded at Washington City, District of Columbia, this nineteenth day of October, A. D. 1872, by and between Francis A. Walker, Commissioner of Indian Affairs, representing the United States, of the one part, and the undersigned chiefs, headmen, and members of the Wichitas and affiliated bands of Indians duly authorized to act for their people, of the other part, witnesseth:
>
> ARTICLE 1. The United States hereby give and grant to the said Wichitas and other affiliated bands, for a home, the tract of country bounded as follows, to wit: Commencing at a point in the middle of the main channel of the Washita River where the 98th meridian of west longitude crosses the same, thence up the middle of the main channel of said river, to

the line of 98° 40′ W. L., thence on said line of 98° 40′ due north to the middle of the main channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the 98th meridian, thence due south to the place of beginning.

ARTICLE 2. In consideration of the reservation provided for in the preceding article the said Wichitas and other affiliated bands hereby cede and relinquish to the United States all right, title, interest, or claim of any nature whatsoever, in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States.

(Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, pp. 3, 56.)

The tract of country described in this agreement had practically existed as the Wichita Reservation for some time. It was bounded on the east by the Chickasaw Nation, on the north by the Seminole session of 1866, on the west by the Cheyenne and Arapahoe Reservation, set off in 1869, and on the south by the Kiowa and Comanche Reservation, established in 1867.

In his annual report for 1872 the Commissioner of Indian Affairs (p. 101) recommended the ratification of the agreement, but no action was taken by Congress upon this recommendation. Since the date of the agreement, however, the boundaries therein named have been officially maintained as those of the Wichita Reservation, and annual appropriations have been made for the support of the Wichita and affiliated bands, residing thereon.

On June 4, 1891, an agreement was made between the United States and the Wichita and affiliated bands of Indians for the allotment to each of the said Indians, in

severalty, of 160 acres of a certain tract of land therein described (heretofore known as the Wichita Reservation), and for the sale of the balance thereof subject to the decision of Congress upon the claim of the said Indians for compensation for the said balance. This agreement was submitted to Congress January 6, 1892. (Sen. Ex. Doc. No. 14, Fifty-second Congress, first session.) By the Indian appropriation act of March 2, 1895, § 1 (28 Stats., 876, 894–899), the claim of the Choctaws and Chickasaws to this land, and that of the Wichita and affiliated bands to compensation for the unallotted portion, were referred to the court below for final adjudication, the United States being made a party defendant to the suit.

The case was tried in January, 1898, and on March 21, 1899, the court below entered its decree (Peele, J., dissenting), providing that the proceeds of the sale of the balance of the Wichita Reservation, over and above the allotments made or to be made to the members of the Wichita and affiliated bands, should be paid to the Choctaws and Chickasaws (Rec., 442); whereupon the Wichita and affiliated bands took this appeal (Rec., 443). The United States also appealed, and the Choctaws and Chickasaws took a cross appeal, but as those two appeals raise entirely different issues from those of the present appeal, they are considered in a separate brief.

BRIEF OF ARGUMENT.

In the brief for the United States upon the issues raised by its own appeal (case No. 337) and the cross appeal of the Choctaws and Chickasaws (case No. 339)

it has been stated that the United States conceded that the permanent settlement of the Wichita and affiliated bands upon the Wichita Reservation invested them with a full right of occupancy therein, and all the incidents of such right, so that they are now entitled to receive 160 acres apiece in severalty, and also the proceeds of the sales of the balance of the land whenever such sales are made as authorized by the jurisdictional act. If this were all that the Wichita and affiliated bands claimed, the United States would indorse the appeal of these Indians instead of opposing it, but as their appeal is based upon a claim for very much more than the full beneficial interest in the reservation, the attitude of the Wichita and affiliated bands is, as regards such basis of their claim, as antagonistic to the United States as is the attitude of the Choctaws and Chickasaws in regard to the Wichita Reservation.

It is true that in the present suit the Wichita and affiliated bands ask for judgment only in regard to the Wichita Reservation, yet they evidently intend, in case of an unrestricted judgment in their favor, to avail themselves hereafter of the sixth article of the agreement of June 6, 1891, reading as follows:

> It is further agreed that there shall be reserved to said Indians the right to prefer against the United States any and every claim that they may believe they have the right to prefer, save and except any claim to the tract of country described in the first article of this agreement. (28 Stats., 896.)

The position of the United States as to this claim is that the affiliated bands never had any rights of occupancy north of the Red River (no such rights south of

this river having ever been the subject of claims against the United States, but only against Texas); that if the Wichitas ever had any such rights they were confined to points outside the present Wichita Reservation, and had been lost by abandonment long before 1859; and that no land outside that reservation was ever given or promised to these Indians by the United States; but that since they have asserted a claim for more than this reservation, the decree in the present case should be so framed as to bar them from renewing the claim in any subsequent proceeding. The court below has undoubted jurisdiction to enter such a decree. The jurisdictional act directs the court to consider and determine "the rights" (i. e., of course, *all* the rights), "legal and equitable, of the United States," as well as of both the claimant and defendant Indians in the premises, "and to try and determine all questions that may arise in behalf of either party in the hearing of said claim." The claim of the Wichitas and affiliated bands to land outside the Wichita Reservation is such a question. First, because these Indians have based their claim to that reservation upon the larger claim to a district including not merely that reservation but an indefinite quantity of the surrounding country; and second, because that reservation was given to these Indians with the intention and understanding that no claim for any other land should be made against the United States. It being submitted that the agreement of 1872 not merely expressed the real intention of the parties, but also, though never formally ratified, had been practically adopted and acted upon by both sides, the court below was asked, in

behalf of the United States, to couple a decree in favor of the Wichita and affiliated bands with a requirement that they should execute a formal release of all other claims to land. Certainly any such decree should either require such a release or else the decree should positively declare that these Indians have no valid claim upon the United States for any land outside this reservation. Should the final decree leave this matter unsettled, the respective rights, legal and equitable, of the United States and these Indians in the premises would not be "determined" as required by the jurisdictional act.

In order that the court may be in a position to direct a complete decree to be entered, covering all the rights, legal and equitable, of all the parties to this suit, as the jurisdictional act requires, the whole claim of these Indians must be carefully considered. It is a twofold claim, as follows:

First. The Wichitas (153 in number) claim the entire "leased district" as their own territory by original and continuous occupancy.

Second. The Wichita and affiliated bands (about 1,060 in number) claim the entire "leased district" as their common territory by virture of promises alleged to have been made to them by the United States in 1859, when they were placed thereon.

These claims are certainly antagonistic, and if the second could be sustained the first would have to fall, because the Wichitas, having acquiesced in 1859, and ever since, to the admission of the affiliated bands to what the former claimed was their own exclusive territory, could not now be allowed to say that they alone should have

the benefit of the country and that the United States must make other provision for the affiliated bands. Apparently the Wichita claim is brought forward in order that if the claim based on the transactions of 1859 is decided against them, the Wichitas may still have a claim to fall back upon, even if the affiliated bands have not.

THE WICHITA CLAIM TO THE ENTIRE "LEASED DISTRICT."

The striking feature of this claim is not so much that it is the claim of 153 persons to 7,713,238.84 acres, as that, in view of the basis upon which it rests, there is no reason why it should be limited to that particular extent of country, or why the United States should be called upon to compensate these 153 persons if Texas is not also called upon to do so. By their own showing these 153 Wichitas have just as good a title to all the country between the mouth of the Canadian (at 95°) on the east, the one hundredth meridian on the west, the Red River on the south, and the Canadian and its north fork (or perhaps the Arkansas and the Cimarron) on the north, and to a territory of even greater extent in Texas, as they have to the 7,713,238.84 acres of the "leased district." In fact, to quote the words of their counsel in the court below, they recognize the "leased district" only "as a convenient form of designating, not the pristine home of the Wichitas, but rather a portion of it, in which the lands at issue herein happen to be situated." Hence it is not certain that the Wichita claim is even

limited to the "leased district," and whatever be its limits now there is no reason why it should be so limited in the future, unless the judgment of this court in the present case shall impose some limitations upon it. The great difficulty with the Wichita claim, if it have any foundation at all, is to find out where it really ends, because neither the United States nor any other nation has ever at any time made a treaty of limits with the Wichitas. The Choctaw and Chickasaw claim may be unreasonable and unjust, but it is at least definite. They claim every acre within certain definite boundaries, but not a foot outside, and their claim is based exclusively upon certain treaties with the United States. The claim of the 153 Wichitas, on the contrary, rests upon traditions of pristine habitat and the more or less inexact statements of explorers, while its geographical limits extend or recede according to the point of view of the individual who considers them.

From the Wichitas' point of view, the only possible boundaries of the country which they claim by right of pristine habitat are natural boundaries, i. e., such as really interposed a substantial barrier between the Wichitas and their enemies. The Cross Timbers make such a boundary on the east, though if, as appears to be the case, they claim the country westward from where La Harpe would seem to have found them in 1719, the northern part of their eastern boundary would be considerably east of the Cross Timbers. The country they really claim is nothing less than the "Great Prairie," which includes the "Staked Plain," and the general level of whose surface

is broken only by the Wichita Mountains, rising like an island from the sea of prairie. The mountains of Colorado and New Mexico bound this prairie on the west, but to the north and south are no natural boundaries nearer than the Arkansas and the Pecos, and the main reason for regarding these streams as boundaries is that we do not know of the Wichitas ever having crossed them.

That 153 individuals should claim the entire "Great Prairie west of the Cross Timbers" by right of pristine habitat is manifestly preposterous; but yet, unless their claim is restricted to the present Wichita Reservation, and to that in common with the "affiliated bands," there is absolutely no place where limits can be put to their claim short of the natural boundaries of the "Great Prairie." If their claim of pristine habitat is worth anything, it attaches as much to one part of this prairie as to another, for down to the year 1859, when the United States placed them on the reservation and undertook to keep them there, they were practically free to roam, and apparently did roam, over the whole prairie, and they could have built their villages of grass huts wherever they chose, without hindrance, on any spot not actually occupied at the time by the villages or camps of other Indians.

The very vastness of the Wichita claim, however, demonstrates it weakness, its lack of foundation, and this can not be remedied by concentrating the claim, so to speak, by restricting it to a smaller area. This court can not, for instance, entertain the claim of original occupancy, or "pristine habitat," as regards the Wichita Reservation alone; for unless this claim is valid as regards the whole prairie, it can not be valid as regards that reservation.

Looking, then, at the claim to the entire "Great Prairie west of the Cross Timbers," the first thing to notice is that it can not be an exclusive claim. The Comanches, Kiowas, and the affiliated bands are clearly shown by the evidence to have lived in and roamed over the Great Prairie just as the Wichitas did, and, in fact, the former, except two or three of the affiliated bands, made much more use of the prairie than did the Wichitas; and this not merely because the former were very much the more numerous, but because they were purely nomadic, and did not cultivate the ground at all. It is impossible to say which tribe was first on the prairie, and it would be immaterial in any event, for the priority gave no exclusive rights. Those who came later stood on the same footing as those who had preceded them.

The fact that the Wichitas, in common with other tribes, hunted buffalo in any part of this vast prairie did not constitute an occupancy of it by the Wichitas within the meaning of the doctrine announced in *Cherokee Nation* v. *Georgia* (5 Pet., 1, 17) as to the right of Indians to "the lands they occupy." The only lands which the Wichitas occupied at any time were those which they cultivated and where their villages stood, and their occupancy of these was not continuous, as they moved their village or villages from time to time. Hence the Wichita claim is really twofold, covering a right, in common with other tribes, to hunt in the "Great Prairie west of the Cross Timbers," and also an exclusive right of occupancy in whatever land they actually occupied, within the meaning of the doctrine of *Cherokee Nation* v. *Georgia*, in 1859.

While the right to hunt is not a right of occupancy, it is a substantial right, and it has been recognized, both by the United States and the Choctaws, as far as regards all that portion of the Great Prairie which was within the United States in 1835. The treaty of August 24, 1835 (7 Stats., 474), provided that the Comanches, Wichitas, the associated bands of both, the Cherokees, Muscogees (i. e., Creeks), Choctaws, Osages, Senecas, and Quapaws, each and all of them, had "free permission to hunt and trap in the Great Prairie west of the Cross Timbers, to the western limits of the United States." So much of that district as lay south of the Canadian had been acquired from the Quapaws by the United States in 1818 and granted to the Choctaws in 1820, while so much as lay north of the Canadian had been granted to the Cherokees in 1828. (7 Stats., 311.) As far, therefore, as treaty rights were concerned, the Cherokees and the Choctaws were those who granted this permission to hunt and trap, while the Wichitas and others, being parties to this treaty, were thereafter entitled to claim their hunting rights by virtue of the treaty alone, and could not set up any aboriginal right to such claim.

The Choctaw and Chickasaw agreement of January 17, 1837 (7 Stats., 605), was of course subject to the provisions of the treaty of 1835 as to that portion of the Choctaw country which lay west of the Cross Timbers, and the lease to the United States, made in 1855, was likewise subject to the same provisions. When, however, the United States, in 1859, settled the Wichitas and affiliated bands (who were presumably the same as the "associated bands" referred to in the treaty of 1835)

in a portion of the leased district, it was clearly understood that thereafter these Indians should remain within the bounds of their reservation (whatever those bounds were, a matter which will be considered below) and should not depart therefrom, whether to hunt on the Great Prairie or for any other purpose, without the agent's permission, so that their coming on to the reservation necessarily involved an abandonment of their rights under the treaty of 1835.

Whether these Indians were called upon to formally renounce their rights under that treaty or not does not appear, and such formal renunciation would have been wholly unnecessary. The reservation policy of the United States had been adopted for many years, and was perfectly well known to the Indians. It was an essential feature of this policy that when Indians were once placed on a reservation they had to stay there, and acceptance of the reservation was itself a renunciation of all right to hunt and trap outside its limits, except by permission of the Government.

What rights of occupancy the Wichitas had in 1859 depend on the history of the tribe, and also on its numerical strength. An Indian title is a title by occupancy, and when that occupancy ceases the title ceases. This occupancy may be less definite than that of white men, and what constitutes occupancy by a strictly nomadic tribe may differ from the occupancy of an agricultural tribe; but whatever country a tribe may fairly be said to occupy, to that alone it has a title. If that occupancy be terminated, either by voluntary abandonment (for instance, an abandonment due to failure of

game, failure of crops, the prevalence of disease, or natural restlessness, the mere influence of the nomadic instinct) or by forcible expulsion by another tribe, the title terminates also.

The tribes of the east, with which the colonies, and the United States also, at first, had to deal, were comparatively sedentary peoples. They were hunters, it is true, but they also cultivated the ground and built fairly permanent dwellings. They remained in the same places year after year (until the white men, by war or by treaty, gradually caused them in most cases to leave their homes for the forests farther west), and the bounds of the territory of each tribe or aggregation of tribes were fairly well defined. It naturally resulted that the opinions in the earlier cases dwelt specially upon the extinguishment of the Indian right of occupancy by a voluntary cession to the United States. Thus, in *Cherokee Nation* v. *Georgia* (5 Pet., 1, 17) Marshall, C. J., said:

> * * * the Indians are acknowledged to have an unquestionable and heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our Government; * * *

Clearly what the court had in mind, in using these words, was the condition of the sedentary tribes of the East, for these words could have no application to (nor had the court probably any knowledge of) the purely nomadic tribes of the West, who existed solely by hunting, had no more permanent dwellings than their tepees, and changed their habitat from time to time. These words would not even apply to the case of the tribes who may be described as seminomadic, viz, those who

cultivated the ground and lived in the same huts for a number of years, but who still, for one cause or another, changed their dwelling places and hunting grounds from time to time.

Whatever the court's knowledge, in 1831, of the different modes of Indian life, the words above quoted were strictly limited to the case of actual Indian occupancy. "The lands they occupy," not those they may have formerly occupied, are those as to which a voluntary cession was stated to be necessary. The occupancy contemplated by the court was obviously an actual one—not a theoretical or imaginary one—and it follows, as a corollary, that no matter how long a tribe may have occupied a certain region, yet, if at any time it ceases to occupy it, then "a voluntary cession to our Government" is unnecessary, and would cede nothing, because the right of occupancy would have already been extinguished.

In *Johnson* v. *McIntosh* (8 Wheat., 543, 590) the same eminent jurist seems to have had distinctly in mind the possibility of the legitimate acquisition of the possession. as well as the fee, of land formerly occupied by Indians, in consequence of a simple abandonment without any formal cession, for, after announcing that the legal doctrine of the right of the Indians to the occupancy, and of the United States to the fee, was the same that had prevailed in colonial days, when the fee was in the Crown, he said:

> As the white population advanced that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed.

> The soil, to which the Crown originally claimed title, *being no longer occupied by its ancient inhabitants*, was parceled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the Crown, or immediately through its grantees or deputies.

The same idea of the consequences of an abandonment of occupancy as distinguished from a formal cession seems to have been in Chief Justice Marshall's mind, though without regard to the particular reasons for abandonment, when he said, in *Cherokee Nation* v. *Georgia*, already cited:

> They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases.

The effect of abandonment is directly stated by Baldwin, J., in another case:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way, and for their own purposes, were as much respected, *until they abandoned them*, made a cession to the Government, or an authorized sale to individuals. *In either case* their right became extinct, the lands could be granted disencumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians. * * * Such was the view taken by this court of Indian rights in the case of *Johnson* v. *McIntosh* (8 Wheat., 571), which has received universal assent (*Mitchel* v. *United States*, 9 Pet., 711, 746.)

That the statement quoted above from *Cherokee Nation* v. *Georgia* has been understood by the court as referring to a cessation of possession by abandonment merely is clear from the paraphrase of it, given in *United States* v. *Cook* (19 Wall., 591, 593), as follows:

> The possession, *when abandoned* by the Indians, attaches itself to the fee *without further grant.*

This last statement of the law having been quoted without criticism in *Beecher* v. *Wetherby* (95 U. S., 517, 526), may be taken as the settled doctrine of the court.

It follows from the doctrine above stated that in ascertaining whether the Wichitas had a right, in August, 1818, when the Quapaw treaty was made, to any part of what afterwards became the Wichita Reservation, the thing to be determined is whether the Wichitas actually occupied any portion of the reservation at that time. If they did not occupy it then, it is immaterial whether they may have occupied it at any previous time or not. Moreover, as the Indian right of occupancy in any land may be lost by abandonment, without any cession to the Government, it is clear that if a tribe which has no treaty of limits with the United States diminishes in numbers, this diminution works an abandonment of a portion of their land, for a smaller number of persons can not occupy the same quantity of land, after the Indian manner, that a larger number did. If a tribe makes a treaty of limits with the United States, it is entitled, as long as it exists, to all the land within those limits; but if its title depends merely on occupancy, it can not claim more than it occupies, a quantity which must to some extent depend on its population. Hence

the numerical strength of the Wichitas must be a factor in the case.

In discussing the history of the Wichitas in the court below their counsel referred first to their traditions, and then attempted to make the statements of travelers or historians accord with those traditions. It is submitted that by far the safer plan is to examine first the written accounts, and only to rely on tradition in so far as it accords with them. The latter plan will therefore be followed here.

The word Wichita is the Osage name for the tribe, and is believed to mean "moving about," "migrating" (American Antiquarian, Vol. XIII, p. 251, Rec., 222), the Wichitas calling themselves Kitikitish. The name Wichita or Washita, as given to certain streams in Louisiana, Arkansas, Texas, and the Indian Territory, and to the Wichita Mountains,* has evidently been given to those streams or mountains by other Indians or by

* The town of Wichita, in Kansas, takes its name from the temporary settlement of the Wichitas there during the rebellion, when driven from their reservation by the Confederates and their Indian allies. It therefore indicates nothing as to the early history of the tribe. The name Fausse Ouachita, or False Washita, given on the earlier maps of this century to the Washita River of the Indian Territory, is possibly due to the fact that the Washita River of Arkansas and Louisiana was long believed to rise near the source of the Arkansas. (See Senex's map, 1710, Rec., 79; Le Page du Pratz, Vol. I, p. 152, 1758; La Harpe's references to a stream which he supposed to be the "rivière des Ouachitas," 6 Margry, 286, 287, Rec., 154.) It is possible that some French voyageurs, going from the Arkansas to the Red River, came upon a stream which they believed to be the "rivière des Ouachitas," and followed it to its mouth, when they discovered their error and called it the Fausse Ouachita.

white men, and does not indicate that the Wichitas themselves called those streams or mountains by their tribal name.

If the word "Wichita" has the above meaning, it appropriately designates the tribe, as, although not strictly nomadic, like the tribes who dwelt in tepees and lived solely by hunting, the Wichitas were wholly without permanent homes until they were brought to the reservation in 1859. They built huts of a peculiar shape, and raised crops, but moved their village or villages every few years. Until Dodge and Catlin visited them in 1834, but little was known of them, and the attempt to resort to tradition where actual knowledge fails can not lead to any certain results.

The first historical reference to the Wichitas that has as yet been found is that of Tonti, under date of February, 1688, who states that the nation of the Nachitoches "makes but one people with two others, which are the Ouasita and the Capichis," whose chiefs met him along with those of the Nachitoches. Tonti does not state precisely where the Ouasita dwelt. (Découvèrtes en Amérique, Paris, 1697, p. 319; Rélation de la Louisiane, Amsterdam, 1720, p. 196; Rec., 94.)

The next record of the Wichitas is that Bienville found them on a branch of the Marne (Red River) in 1700 (4 Margry, 432, 434; Rec., 147), presumably where Senex's map of 1710 (Rec., 79) and De l'Isle's map of 1720 (Rec., 91) place them, viz, a short distance up the Ouachita River. In September, 1719, La Harpe came upon an encampment of "Touacaras, Toayas, Caumuches, Aderos, Ousitas, Ascanis, Quataguois, Quicasquiris, Honechas," on "the

southwest branch of the Alcansas River," i. e., evidently the Canadian,* not far above the mouth of its North Fork (6 Margry, 289; Rec., 156.) These names may be apparently identified as those of the Tawakoni, Tawéhash, Southern Comanche, Adái, Wichita, Caddo, Kiowa Apache, Kirikirish (=Kitikitish), and Waco tribes, the last on the theory that "Honechas" is a misprint for "Houechas," as indeed "Quicasquiris" is manifestly a misprint for "Quirasquiris." As La Harpe elsewhere used the spelling Ouachita, it is possible that by "Ousita" he did not mean Wichita, but it must be admitted that the other names are of tribes with which the Wichitas might naturally be found, and, in fact, "Quirasquiris" evidently refers to the Wichitas, whether "Ousita" does or not. La Harpe's statement (6 Margry, 293; Rec., 157) that these Indians told him "that they were allied with the two Ascanis and Ousita villages situated north-northwest from their dwellings, at 60 leagues distance," involves,

* In the court below counsel for the Wichitas assumed that this stream was the Cimarron, and that La Harpe had previously crossed the Canadian and its North Fork, supposing them to be branches of the Washita, and called by him its west and west-northwest branches. It is impossible to follow La Harpe's course or to calculate the distance he traveled with any certainty whatever, as his course was confessedly far from direct, while the daily computation of distance is by whole leagues, though it is most unlikely that an exact number of leagues, without fractions, was traversed each day. Taking La Harpe's account as it stands, however, his general course was about northwest by north, which would bring him to the Canadian a little above the mouth of its North Fork. Had he crossed the latter he would next have come to the Deep Fork, but no mention is made of any such stream; and as he went only a little more than 15 leagues (say 30 miles in a straight

however, a manifest error, both because the Ascanis and Ousita (Caddo and perhaps Wichita) tribes had already been mentioned as among those with whom La Harpe then was, and also because all authorities agree that the Caddos and Wichitas were never north of the Canadian.

The fact that so many tribes were found together indicates that they were outside their own proper territory and had joined for mutual defense against the Osages, in whose country they then were, and a small band of whom had met La Harpe only a fortnight before. (6 Margry, 284, Rec. 153.) Why this aggregation of southern tribes had left their proper homes does not appear, nor when they had left it, nor how long they stayed on the Canadian. Certainly they were not there in 1740, for the Mallet brothers, who mentioned the various bands of Indians they met on or near the Canadian, said nothing of any of those mentioned by La Harpe (see 6 Margry, 460–462), while Fabry, who wintered on the Canadian

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line, on a northerly course from what he called the west-northwest branch of the Washita to what he called the southwest branch of the Arkansas, the latter could not have been the Cimarron, as it is much more than 30 miles north of the North Fork of the Canadian at that point and for a considerable distance farther west. The Indians' statement that the river "formed two branches below their village" (Rec., 157) is intelligible when understood of the Canadian and its North Fork, but not when applied to the Cimarron, which has nothing that can properly be called a branch. Their further statement that their own stream ascended toward the setting sun to Spanish and "Padouca" villages was much nearer the truth when applied to the Canadian than when applied to the Cimarron, as the Mallet brothers came from Santa Fe by the Canadian in 1740 and met "Padokas" on the way (6 Margry, 461). The streams La Harpe took for branches of the Washita were perhaps the Push Metau and Sans Bois Creek.

in 1741–42, met Osages, but no other Indians. (6 Margry, 474–485.)

The fact that La Harpe reported the "Ousita" on "the southwest branch" of the Arkansas explains the appearance of the name "Ouachita" some distance up the Arkansas in De l'Isle's map of 1720 (Rec. 91), and in De l'Isle's Atlas Nouveau of 1741. (Claimant's exhibit No. 28, reproduced in brief for the United States in cases 337 and 339.) De l'Isle also placed this name near the Red River. All geographical statements of European map makers of the last century in regard to Indian tribes must be received with the greatest caution, as the information which came to them, usually very indirectly from the reports of explorers, was fragmentary and imperfect.

In the court below, counsel for the Wichitas assumed that Bienville found but a handful of the tribe, then leaving their Louisiana home forever, and that the removal mentioned by Le Page du Pratz, writing about 1758, was that referred to by Bienville. (See Rec., 98, 147.) There is nothing, however, in Bienville's journal to warrant this assumption. He states that at a certain place he found Wichitas who had abandoned their village and were on their way to the country of the Taensas, and that six days later he reached the Wichita village, where but about five lodges and sixty-six men were left. Bienville does not state how many Wichitas he met on their way to the Taensas country, nor that no other parties were on their way or had already arrived. There is no reason whatever for supposing that he met all of the tribe who were then in Louisiana, still less for limiting their number to a handful. There may have been hun-

dreds of them for anything that appears in Bienville. It is, moreover, certain that the migration referred to by him was not that mentioned by Du Pratz, because Bienville stated that the Taensas village was but 20 leagues west of the Wichita village (4 Margry, 434; Rec. 147), while Du Pratz stated that the Wichitas went very much farther off, even to the Caddo country, 300 miles west of the Mississippi, where they were safe from the Chickasaws.

Counsel for the Wichitas also contended that those of the tribe whom La Harpe found on the Canadian (they contend, Cimarron) in 1719 must have separated from the Louisiana Wichitas long before, apparently a generation or more before 1700, the time when Bienville wrote. They point out that Bienville mentioned the "Ouachita" as having canoes, while Beaurain's note to La Harpe (6 Margry, 290; Rec., 156) states that none of the nations whom La Harpe met on the Canadian made dugouts, "having no knowledge of them [or, perhaps, 'of it,' i. e., the art of making them] up to the present time." In the first place, however, as Bienville, who used the word "canot" (canoe), and Beaurain, who used the word "pirogue" (dugout), were evidently not referring to the same type of boat, it is not at all certain that the Indians on the Canadian may not have had canoes, even though they had no dugouts. Then, too, we know nothing positive about the sources of Beaurain's information, which he certainly did not gather at first hand, for he was not on the spot with La Harpe. We do not even know when he wrote these notes. It is very possible, even probable, that he was misinformed, as La Harpe stated

that these Indians believed that after death they em
barked for the next world on a large dugout, steered b
a black man (6 Margry, 296), which shows that the
knew that such things as dugouts could exist and wha
steering a boat meant, whether they found it necessary
in their own mode of life in the place where he foun
them, to make and use dugouts or not.

According to La Harpe the Touacaras (Tawakonie
were the leading tribe, as he always refers to the vi
lage as that of the Touacaras, and states that the chi
of the Touacaras was the most respected of all, enjoy
ing certain special privileges which in a savage com
munity would assuredly not have been granted excep
to a chief whose followers were sufficiently numerous t
compel compliance with his wishes. At the same tim
La Harpe states that the Toajas were the most numerou
nation. This is one of the puzzles about La Harpe
narrative, presumably due to the fact that La Harp
carried on conversation through two interpreters, a
Indian and a French soldier, who had a common knowl
edge of Nassonite, a language equally unknown to th
chiefs and to La Harpe.

La Harpe states that the chief of the Touacaras an
six other chiefs of nations met him, and he mentio
seven distinct tribal names, counting the names Toaya
Quirasquiris, and Ousita as referring to one tribe. Fro
this it would seem that he met seven tribes in all, vi
the Tawakoni, Southern Comanche, Adái, Wichit
Caddo, Kiowa Apache, and Waco. Leaving out th
Wichitas, it will not be denied that every one of th
other tribes belonged at that time in Texas, excep

the Caddoes, who belonged in Louisiana, near the Texas border, and possibly the Tawakonies, on the strength of Niastor's alleged tradition, though as to these it is safer to take Dunbar's statement that their home was upon the Upper Leon River. (The Pawnee Indians, p. 2.) It can not be contended that any of these tribes had remained long in or near the locality where La Harpe met them, or that they were in the course of a migration to Texas from some other point. It is most probable that their stay, which was only during the summer time, in any event, lasted but a few seasons, after which they returned to the regions where they properly belonged. If, as counsel contend, the Wichitas did not return to Louisiana and moved westward along the Red River, but went southwestwardly from the Canadian (they contend, Cimarron) to the Wichita Mountains and other parts of the leased district, what became of the other tribes? Why were they not associated with the Wichitas in such a movement?

After 1719 the next record of the Wichitas is found in Le Page du Pratz's Histoire de la Louisiane, published in Paris in 1758. He says:

> At present there remains nothing of this [Ouachita] nation, the Tchicachas [Chickasaws] having destroyed the greater part and the rest having retired to the Cadodaquioux [Caddos], where the Tchicachas dare not molest them. (Vol. II, p. 242; Rec., 98.)

In the paragraph immediately preceding the one quoted du Pratz stated that the Cadodaquioux lived upon the Red River, three hundred miles west of the

Mississippi, so that this must be taken as the location of the Wichitas, according to du Pratz's ideas, at the time that he wrote. As he had lived sixteen years in Louisiana (see preface to English edition), his statement carries some weight. It is most probable, therefore, that after La Harpe met the Wichitas they returned to Louisiana, where the Chickasaws attacked them.

Du Pratz's statement that the Ouachitas went westward is not merely found in Jefferys' History of the French Dominions in North and South America (London, 1761, Vol. I, p. 165, Rec. 98), but receives confirmation from Dunbar, who visited the Washita River in 1804, and reported that the tribe of that name, formerly dwelling on its banks, was said to have gone "into the great plains to the westward." (Am. State Papers, Ind. Affs., Vol. I, p. 732.)

The removal referred to by du Pratz must have taken place some time before his book appeared, for the Taovayases (Tawéhash) are stated to have been among the tribes who attacked the Presidio of San Savàr (now San Saba, San Saba County, Tex., near the center of the State) in 1758 (Documentos para la Historia de Texas, vol. 1, p. 33, in Cong. Lib.), and also defeated Parrilla's force the next year. (Bancroft's Works, Vol. XV, pp. 626–628; Rec., 203.) The latter defeat was inflicted near the village which De Mesieres called San Teodoro, when he visited them in 1778, eighteen years after Padre Calahorra had pacified them. (Documentos, etc., vol. 1, p. 33, vol. 2, pp. 272, 275; Rec., 210.)

De Mesieres reports "the Taovayase Nation" as divided into two villages, which he called San Bernardo and San

Teodoro, on opposite sides of the Red River, not far west of a wooded mountain, which may mean the Cross Timbers; but as he also reports the mountains of New Mexico, where the Red River was supposed to rise, as being about four days' travel from the villages, his geography can not be wholly relied on. Fragoso seems to have found them somewhat south of there in 1788. (House Ex. Doc. No. 21, Fiftieth Congress, first session, p. 49.)

The counsel for the Wichitas (Brief, p. 15) cite the statement of Fabry (who saw an abandoned Wichita village on the Canadian in 1742) as confirming their view that La Harpe in 1719 found these Indians still farther north. They omit to point out, however, that, as to the Wichitas, Fabry supplies the missing link between the statements of La Harpe and of Du Pratz. Fabry's statement is:

> The 24th [January, 1742] he saw come to his camp a party of thirty-five Osages, who were going to war against the Mentos, whom these savages also call Pawnees, who were formerly on the Arkansas River, above its forks and 25 leagues below the Black Pawnees, whence they withdrew to the River Saint André [Canadian], where one still sees their old village, and four or five years ago [they withdrew to] near the Kadodakious [Caddoes], where they are at the present time. (6 Margry, 474.)

Beaurain's note to La Harpe's narrative (Rec., 156) states the belief that the Indians met by the latter were the Mentos, but even without this it is clear enough that Fabry was referring to those whom La Harpe met, apparently at the same "old village" on the Canadian whose remains Fabry saw. From the Canadian they

went to the Caddo neighborhood in 1737 or 1738, precisely as stated by Le Page du Pratz, whose work was published in 1758.

It may be added that Fabry, on his return, struck the Red River "three days' journey above the Tavakavas and the Kitsaiches." (6 Margry, 492.) It is practically certain that "Tavakava" is a misprint for "Touacara," i. e., Tawakoni, while it is highly probable that "Kitsaiche" is a form of "Kichai," i. e., Keechi. Certainly the place where Fabry found the Tavakavas and Kitsaiches, on the Red River, near the Caddo country, is just where the Tawakonies and Keechies seem to have been at that time.

Putting Tonty, Bienville, La Harpe, Du Pratz, Fabry, and the Spanish records together, the most reasonable conclusion, that which involves the least amount of conjecture, is that the French found the Wichitas originally in Louisiana; that for a time, probably short, the tribe, or a portion of it, passed the summer season on the Canadian together with portions of other southern tribes, but that ultimately they were driven westward up the Red River by the Chickasaws, after which time they were found among the Indians with whom the Spaniards had to deal in Texas.

After the Wichitas' attack on San Savàr in 1758 (where they figure under their Spanish name, Taovayases), and from that time until Fragoso's visit to them in 1778, they certainly lived in Texas, apparently on the Red River, a little west of the Cross Timbers, and also, at least in 1778, directly across the river in what is now a part of the Chickasaw country. (Rec., 208.) From

1788 there is no record till 1805, when Sibley reported on all the Indian tribes in Louisiana south of the Arkansas and between the Mississippi and the Rio Grande. This report includes the following statement:

> PANIS OR TOWIACHES. The French called them Panis, and the Spaniards Towiaches; the latter is the proper Indian name. They live on the south bank of the Red River, by the course of the river upward of 800 miles above Natchitoches, and by land by the nearest path is estimated at about 340. They have two towns together; the lower town, where the chief lives, is called Witchita, and the other is called Towaahach. (Am. State Papers, Ind. Affs., Vol. I, p. 723.)

It is unlikely that the two Towiache villages referred to by Sibley were actually named Witchita and Towaahach, respectively. What Sibley was told, in all probability, was that the tribe had two villages and also that it was called Witchita (Ouichita) as well as Towaahach (Towiache), as was certainly the case, the one name being used by the French and the other by the Spanish. For some reason Sibley inferred erroneously that these were names of villages, not different European names for the same tribe.

Sibley gives, however, some valuable information, viz, that the Towiaches live "on the south bank of the Red River," about 340 miles above Natchitoches by the nearest path, and 30 miles (by water 70) above the mouth of the False Washita. He also states that their language differs from that of all the other tribes referred to by him (viz, those south of the Arkansas, between the Mississippi and the Rio Grande) except the Tawakenoes,

whose name he translates as Three Canes, and whom he locates on the west side of the Braces (Brazos). He speaks of the alleged descent of the Tawakenoes from the same ancestors as the Towiaches, therein agreeing with Niastor (Rec., 221), from whom, however, he differs altogether as to the meaning of the name Tawakenoe or Tawakoni. According to Sibley, both the Wichitas and Tawakonies belonged in Texas in 1805.

Robin, relying on manifestly earlier data than those of Sibley, placed the two villages on opposite sides of the river. (Voyages dans l'Interieur de la Louisiane, Paris, 1807, vol. 3, p. 3, Rec., 99.) He makes it 80 leagues from the upper Caddo villages to those of the Wichitas, a distance which does not quite tally with that given by Sibley, but both parties relied on loose estimates only.

Sibley quotes Brevel as saying that "about forty years ago" (i. e., in 1765) the Panis lived "about 50 leagues above where they now live. (Am. State Papers, Vol. IV, p. 729.) This location is evidently that near where Parilla was defeated in 1759 (Bancroft's Works, Vol. XV, p. 628, Rec. 203), and where De Mesières visited the tribe in 1778. (Documentos para la Historia de Texas, vol. 2, pp. 272, 275, Rec. 208.)

In 1806 Captain Sparks and others attempted to visit the "Pawnee Piquas," but were prevented by the Spaniards, a fact which indicates that these Indians must have been living in Spanish territory, as Sibley had reported. (Long's Expedition, vol. 2, pp. 302–314.)

H. M. Brackenridge (Views of Louisiana, published in 1817, p. 160, Rec. 125) reports the "Pani or Towiache"

ibe as living 800 miles above Natchitoches, 340 by nd, and as having been "much diminished six or eight ears ago by the smallpox." The table on page 150 of ie same book states that the "Tawakenoes or Panis" ve "south of the Red River, above the Caidoques." his is evidently a misprint for "Towiaches or Panis," s the Tawakenoes are also referred to in their proper lace.

Stoddard, writing from data collected in 1804–1810 nd advising the establishment of a garrison and factory n the Red River, at the present northern boundary of ouisiana, said:

> The Indians, who are now obliged to trade at Natchitoches, would be equally well and perhaps better supplied at the proposed factory. In addition to this, the Pawnes [Footnote: These are a different people from those of the same name on the river Platte] and Ietans and some other Indians high up on Red River and to the southwest of it might also obtain supplies from us and thereby be prevailed on to break their connection with the Spaniards. The Pawnes pursue no other game than the buffalo, of which they kill an immense number. They, however, attend to agriculture and raise more than double the quantity of corn and vegetables that is necessary for their own consumption, and furnish their neighbors with the surplus in exchange for peltries, so that their trade, which is now engrossed by the Spaniards, is deemed of considerable value. (Sketches of Louisiana, p. 455.)

According to this statement, the Wichitas seem to have been living in the villages referred to by Sibley.

Humboldt's map (U. S. Exhibit No. 1, reproduced), published in 1811 from data obtained in 1803, shows

"Indiens Taouaiazes" about latitude 36° 30′ north, longitude 103° west. This indicates a Mexican belief that the Tawéhash (Wichitas) were one of the nomad tribes of the Great Prairie.

Pike's map of the internal provinces of New Spain (U. S. Exhibit No. 5), based on information received by him in 1807, shows "Indiens Yawayes" (evidently an engraver's error for Tawayes, i. e., Tawéhash) south of the Red River.

Melish's maps of 1816, 1818 (U. S. Exhibit No. 6, reproduced), and 1820 show a "Panee" village on the south side of the Red River, about 96° 15′ west longitude. This is, of course, the village, or rather the pair of villages, mentioned by Sibley and which Sparks tried to visit. The longitude of some of the localities on Melish's map is incorrect, and this village is placed somewhat farther east than it should have been, according to Sibley's report, but there is no reason to suspect any other error in its location.

Clark's census of Indian tribes, dated November 4, 1816, (Rec., 244–245), states that the Cadeau and Paneas Piqué (i. e., Caddo and Wichita) tribes reside "on Red River near the southern boundary line of the Missouri Territory." Major Long's report of February 20, 1821, states that—

> They [the Osages] have recently driven the Pawneys of Red River from their place of residence, and compelled them to seek an abode upon the head waters either of the Brassis or Colorado. (Rec., 303; see also Long's Expedition, vol. 2, p. 366.)

The "Pawneys of Red River" can only mean the

Wichitas, who are frequently referred to in Long's Expedition under the name of Pawnee Piquas, and whom Long confidently expected to find on the river which he thought to be the Red, but which proved to be the Canadian. This statement of Long's explains the removal from the villages referred to by Sibley in 1805, and which Sparks tried to visit in 1806. The precise locality to which the Wichitas removed was probably the "Towiash" village on the Big Wichita, shown in early maps of Texas.

It is rather significant that in 1820 Major Long, who had met Kaskaias, or "Bad Hearts," on the Canadian, in Spanish territory, about the one hundred and second meridian, followed the course of the Canadian from the one hundredth meridian to its mouth for twenty-five days, constantly on the lookout for Indians, but seeing no signs of any whatever. As he said that the Kaskaias assured him that the river led to the "permanent village of the Pawnee Piquas," it is evident either that he misunderstood them, or else that they knew but little of the village, and could not have lived near it, or roamed far to the eastward of where Long met them. (Long's Expedition, Vol. II, pp. 101–167; see Rec., 275.) As far as Long's observation went, the country was unoccupied by any Indians whatever, and hence his map, made just after the Choctaw treaty was ratified, indicates the country east of the one hundredth meridian as belonging to the Choctaws only.

When the Choctaw treaty of 1830 was before the Senate, inquiry was made of A. P. Chouteau, a well-known Indian trader, who had traveled extensively in the region

of the Arkansas and Red rivers, as to the proximity of wild Indians to the Choctaw country, and he replied as follows:

> And as regards the proximity of the wild or savage Indians, the nearest band is the Paw-nis Pick, whose village is about 250 miles from Fort Gibson. They raise corn and vegetables in small quantities. Other rambling tribes are to be found. They are the Padocas, Aïtans,* Huitsitas, Hichas, and Cousadas. Their range is from the Pawnees Picks to San Antonio, in Texas, to the south. The Comanches, Arapahoes, Cayouwas, and other bands ramble from the head waters of the Great Platte, Arkansas, Red River, in the direction to San Antonio, and parallel to that chain of the Rock Mountains running south. (Rec., 328.)

This statement shows not merely that a distinction was made at that day between the roving Huitsitas (Wichitas) and the more sedentary Pawnee Picks (Panis Piqués), but that the latter did not live within the country granted to the Choctaws in 1820 and regranted in 1830. A distance of about 250 miles from Fort Gibson indicates that the village was somewhere on the Red River, near the mouth of the Big Wichita, for instance, or perhaps on the Big Wichita, where Austin's map of Texas (published the year Chouteau's statement was made) shows a "Towiash" village. Wherever the village referred to by Chouteau was, it could not have been within the bounds of the country granted to the Choctaws, for Chouteau not merely knew what those

*It is impossible to tell with certainty whether this word is Aïtans or Aïtaus in the original MS., but the former is the more probable, as it would be equivalent to Hietans, i. e., Comanches.

bounds were, they having been established ten years before, but he actually knew the country "from personal examination," and it can not be doubted for a moment that if the Pawnee Picks, as he called them, or any other Indians had had a settlement within that country, he would both have known the fact and would have reported it. Of course it is possible that Chouteau's knowledge on this point was acquired a few years previously, and that the Pawnee Picks had actually moved to the Wichita Mountains when he made his statement, but in any event they could not have been there long.

There is no real evidence of an early residence of the Wichitas at the village on the east side of the North Fork of Red River, where Colonel Dodge found the "Toyash" in 1834, and, in view of Chouteau's statement, it may be said that the evidence is that this village had been occupied but a few years. It is true that Mr. Albert Pike's letter of July 12, 1882 (Sen. Ex. Doc. 13, Forty-eighth Congress, first session, p. 29), states that in 1832, when on the Red River, he heard of a tribe called Pawnee Piks living "in the vicinity of some mountains north of Red River, in a village or villages, and cultivating the soil," and who had, as his informants expressed it, "lived there always." In the sense that these Indians had lived in the neighborhood of the Red River for a very long time, though at different points, the expression is substantially true, and that was probably all that was meant. If the expression referred to the site of the particular village, it was not true, and can not even be relied on as evidence that the Wichitas had lived there a long time.

Ski sa ro ka, "an intelligent Toyash," told Dodge "that their nation lived formerly south" (Am. State Papers, Mil. Affs., Vol. V, p. 381), a statement which is opposed to the theory of a migration from the north; and although the further statement that "their oldest men were born there," i. e., in the south, suggests the inference that they had left the south a considerable time before, yet all these statements that come through interpreters must be received with great caution. Ski sa ro ka might have said that all but the children were born in the south, a statement which a very slight misinterpretation would so change as to leave the impression that only the oldest men were born there; or the statement might have been correctly interpreted, and yet had reference to a residence farther south than the one they had most recently left. The distinction made by Dodge, in addressing the Toyash, between them and the "Mexican Indians" may show that he supposed that the former were entitled to reside north of the Red River; but if so, this was merely his opinion, and could not alter the facts.

No valid argument in support of a Wichita right of occupancy of a portion of the "leased district" can be drawn from the Comanche and Witchetaw treaty of August 24, 1835 (7 Stats., 474). This treaty must be understood in connection with the Kiowa, Kataka, and Tawakaro treaty of 1837 (7 Stats., 533), because it had been intended to include these three tribes among the parties to the former treaty, and it was only their accidental absence from the council that prevented their joining at that time. These treaties were for the purpose of keeping the peace between the western tribes—Comanche,

Wichita, Kiowa, Kataka, and Tawakaro, and the eastern tribes—Cherokee, Muscogee, Choctaw, Osage, Seneca, and Quapaw. They were not treaties of limits, nor did they undertake to define in any way the country which any of these tribes was entitled to call its own. They were purely treaties of "peace and friendship," and to secure those ends both treaties provided that all the tribes that were parties to them should "have free permission to hunt and trap in the Great Prairie west of the Cross Timbers to the western limits of the United States." This permission was given as much to the Quapaws, who had undertaken in 1818 to cede to the United States the country between the Red River and the Arkansas and Canadian as far west as the one hundredth meridian; and to the Osages, who had ceded in 1825 the country between the Red River and the Kansas River as far west as a "line to be drawn from the head sources of the Kansas southwardly through the Rock Saline"* (7 Stats., 240); and to the Choctaws, to whom the western part of the Quapaw cession had been granted in 1820; and to the Cherokees, Muscogees, and Senecas, who had no right to any part of "the Great Prairie west of the Cross Timbers," as to

*The Rock Saline is about latitude 36° north, longitude 98° 30′ west, near the source of Salt Creek. The "head sources of the Kansas" were not accurately known in 1825, and were apparently supposed to lie approximately north of the Rock Saline. This would make the western boundary of the cession about the meridian of 98° 30′, the cession itself including a portion of the Quapaw cession of 1818. In the map on page 57 of the brief for the Wichita and affiliated bands the line is drawn southeastwardly, as if the precise sources of the Kansas had been known in 1825. This is an error. The intention of the parties was to draw the line southwardly, not southeastwardly.

the Comanches, Wichitas, Kiowas, Katakas, and Tawakaros, all of whom belonged west of the Cross Timbers. These two treaties, therefore, furnish no argument in support of any exclusive right of occupancy of "the Great Prairie west of the Cross Timbers" on the part of any of the tribes mentioned in the treaties, which secured to the Wichitas free permission to hunt and trap in that region, but nothing more.

While the treaty of 1835 did not undertake to disturb the Wichitas in their occupancy of the village west of the Wichita Mountains, that occupancy in no way increased their rights under the treaty. It can not be pretended that the Comanches, Kiowas, Katakas and Tawakaros, Cherokees, Muscogees, Osages, Senecas, and Quapaws had any rights of occupancy in the leased district, or that the first four tribes had any such rights in any part of the then United States, and yet all these tribes were parties to this treaty (or, in the case of the Kiowas, Katakas, and Tawakaros, to the supplementary treaty of 1837) and secured precisely the same rights in the leased district as did the Wichitas. The Comanches, Wichitas, Kiowas, Katakas, and Tawakaros were not Indians of the then United States, and although the Wichitas, or a portion of them, were actually located within the United States at that time, they do not appear to have had a real right of occupancy there.

If it be asked why the United States should make a treaty with foreign Indians, the answer is that it was done as the easiest and practically the only way of dealing with them. Aside from the general desirability of main-

taining peace among the Indians, the United States and Mexico had both agreed, by the treaty of 1831, "*by all the means in their power*, [to] maintain peace and harmony among the several Indian nations who inhabit the lands adjacent to the lines and rivers which form the boundaries of the two countries." (8 Stats., 424.) Undoubtedly it would have been more logical to have guarded the border with a strong cordon of troops, so as to prevent all incursions of these roving tribes; but practically such a thing was impossible, and the only feasible way of dealing with them, as well as with the northern tribes from within the United States, was to agree, and to get the Choctaws, who had the exclusive right of occupancy, to agree, that all these tribes should have an equal right to pass to and fro and to hunt and trap on the prairie west of the Cross Timbers. It was presumably not expected that this right should continue forever, but rather that it would serve as a temporary expedient until ultimately all these Indians, the foreign tribes as well as those of the United States, should be gathered upon reservations within their respective countries and should be kept there.

The counsel for the Wichitas (Brief, p. 36) insist that the agreement for compensation for injuries to the property of traders (see article 5 of the treaty) shows that "the Wichitas and Comanches possessed the settlements and hunting grounds," while "the Choctaws and others, who were intruders thereupon," did not. As regards possession of the hunting grounds, no such distinction can be made, for article 4 secured equal rights in them

to all the parties to the treaty, while as to settlements it has already been stated above that this treaty did not undertake to disturb the Wichitas in their temporary occupancy of a village within what was strictly Choctaw country, and it does not appear that any of the other tribes to whom article 5 applied in terms had any settlements there at that time, so that as to them the agreement was theoretical rather than practical. The manifest reason why no such agreement was required of the Choctaws, Cherokees, etc., is that they were already sufficiently bound by the treaties previously made with them (e. g., Quapaw treaty of 1818, art. 6; Choctaw treaty of 1830, Arts. VI and XII; 7 Stats., 177, 334, 335).

In 1843 Gen. H. P. Bee found a Wichita village on Cache Creek, about 30 miles from its mouth; but it does not appear how many of the tribe lived there nor how long they had lived there. (Rec., 234.)

Soon after 1835 the Wichitas abandoned the country north of the Red River and removed to Texas, where they lived in various places between the Red River and the Brazos, and engaged in horse stealing to a considerable extent. Their residence in Texas is shown by numerous letters from the Indian agents there (Rec., 254–263; Ex. Doc. No. 8, Thirtieth Congress, first session, pp. 899, 903; House Ex. Doc. No. 1, Thirtieth Congress, second session, pp. 587, 591, 593; Senate Ex. Doc. No. 1, Thirty-first Congress, second session, p. 145) between 1836 and 1850, and by their participation, along with the Comanche, Ioni, Anadaca, Cadoe, Lepan, Longwha, Keechy, Tahwacarro, and Waco

tribes, in the treaty of May 15, 1846 (9 Stats., 844), made at Council Springs, Robinson County,* Texas.

The map in Gregg's Commerce of the Prairies, published in 1844, has a note stating that "the Wacos, Wichitas, Towackanoes, Towyash, Keechyes, Caddos, and Inyes reside chiefly on Red River and its branches, above the Cross Timbers." Gregg does not seem ever to have himself come across any of these tribes, and he does not state whether the branches of the Red River, on which he says the tribes resided, were in Texas or not, but the statements of the Indian agents indicate that these tribes lived exclusively in Texas at that time. Shortly before 1850 the Wichitas or some of their affiliated tribes seem to have lived partly in Texas, west of the Cross Timbers, and partly in the neighboring country directly across the Red River.

The following historical authorities may be cited in this connection:

> In alliance with the Wacoes were the Pawnee Picts, or Toweashes, residing on the Red River, sometimes on the side of the United States and sometimes in Texas. (Kennedy's Texas, 1841, vol., p. 349, Rec., 102.)
>
> The Towaccanies and Toweash resemble each other and are often found associated in the same village; they number about two hundred and fifty warriors. They live high upon the Colorado above the San Saba. (Moore's Description of Texas, 1844, p. 32, Rec., 126.)
>
> The Whacoes, Tawacanies, Toweash, Aynies, San

* This is apparently a mistake, and should be Robertson County, which is shown on the De Cordova map of 1849. There is no county named Robinson in Texas.

Pedro's, Nabauchoes, Nacadochuts, and Hitchies are small tribes, or fragments of tribes, and separately considered are quite insignificant. They have been long resident in Texas and properly belong to it; but they are originally, the Hitchies excepted, of the Caddo stock, being offsets from that family. The Whacoes * * * live in a village on the Upper Brazos. * * * The other small parties, amounting to about fifty families each, live in villages, on the waters of the Trinity and Neches, and cultivate the ground to a small extent. (Statement of David G. Burnet, August, 1847; 1 Schoolcraft's Information Respecting Indian Tribes, p. 239; Rec., 100.)

I was born at To-wako-nee Hills, in Texas, and I come here to Fort Sill when I was about ten years old. The Wichita used to live right there at the foot of the hills. I belonged to the Ta-wako-nees. The Ta-wako-nees are all the same tribe as the Wichitas. (Deposition of Ta-wak-o-nee Jim, a Wichita chief, Rec., 133. It appears that he was born in 1843.)

In Catlin's North American Indians, compiled from personal researches in 1832 to 1839, is a map of Indian localities in 1833. This shows the Pawnee Picts and Wicos on the Red River, in the "panhandle" of Texas (about lat. 35° 10′ N.; long. 103° 15′ W.).

The following maps show a Towiash (sometimes written Towish) village on the Big Wichita west of the ninety-ninth meridian:

Lee's map of Texas, 1836 (Rec., 113).
Austin's map of Texas, 1837 (Rec., 114).
Hunt and Randel's map of Texas, 1839 (Rec., 115).
Arrowsmith's map in Kennedy's Texas, 1841 (Rec., 116).

The preface states that this map has been carefully made from the latest authorities and is believed to be the most accurate.

De Cordova's map of Texas, 1849 (United States Exhibit No. 8). This shows a "Tanawash" village west of the one hundredth meridian, and a Wichita village on the south side of Red River just above the mouth of the Big Wichita.

Young's map, published by Mitchell in 1838 (Rec., 114), and other maps based thereon, show a Towiash village north of the Red River, west of the one hundredth meridian, omitting the Big Wichita altogether; but this map is manifestly inaccurate, as is admitted by Kennedy, who reproduced it in his book merely to show the location of land grants. (Kennedy's Texas, Vol. I, p. 336.)

In 1843 the republic of Texas established a Bureau of Indian Affairs and provided for a line of trading posts, the posts to be located as follows:

No. 1. On or near the South Fork of the Trinity, between the upper and lower Cross Timbers.

No. 2. At or near the Comanche Peak.

No. 3. At or near the old San Saba Mission.

No. 4. At or near Porto Vandero.

No. 5. At or near the junction of the Moras and Rio Grande.

All the country west of a line drawn from Red River to the Rio Grande through these posts was Indian country from which settlers were to be excluded, except by special permission. (See act of Jan. 14, 1843, Tex. Laws, 1843, p. 19; Sen. Ex. Doc., 31st Cong., 1st sess., p. 973.)

On the annexation of Texas in 1845, jurisdiction over the Indians therein passed to the United States, and the

Commissioner of Indian Affairs stated as follows in his annual report:

> The annexation of the Republic of Texas to the United States will make it necessary to organize an agency or branch of this department within its boundaries. The superintendency of Indian affairs for the western territory includes all the Indians south of the line of the St. Louis superintendency, and as far west as the Rocky Mountains, and north of the line of Mexico and Texas. This is a large district and requires the undivided attention of the present efficient superintendent, owing to the unsettled condition of the Camanches, Witchetaws, and other tribes, who lead a wandering life. Sometimes being in Texas and sometimes in the United States, it has been impossible to extend over them the eye of this department. They have neither belonged hitherto to the one Government nor the other; and though several attempts have been made to negotiate with them, every effort of the kind has thus far proved unsuccessful. A commission has this fall been sent out under more favorable auspices, and it is confidently expected that a treaty or treaties of peace and friendship will be entered into with these wandering tribes. (Sen. Doc. No. 1, Twenty-ninth Congress, first session, p. 454.)

The unsuccessful efforts above mentioned were the treaties of 1835 and 1837, which had not produced the desired results. The commission referred to consisted of P. M. Butler and M. G. Lewis, appointed September 12, 1845.

Early in 1846 a report on the Indians in Texas was made, containing these statements:

> The habits of the Indians within the Texas border

are so uncivilized and they are so predatory and wandering that correctness as to their number can not be relied upon.

* * * * *

The Toweash, Waco, Towagany, and Wachita Indians are on the Red River above the Cross Timbers, with their villages on both sides and near each other.

They have amicable relations with the Comanches, though dreading them; are but fragments of tribes and weak, but partially agricultural, raising maize and the various kinds of vegetables. (Rec., 252, 253.)

In March, 1846, the commissioners met chiefs of the Comanche, Mescalero (Lipan), Tawakoni, Waco, Keechi, Kickapoo, Wichita, and Toweash tribes at Comanche Peak, and held a talk with them in regard to a cessation of hostilities and horse stealing, and on May 15, 1846, the treaty was made (9 Stats., 844). This treaty was made in Texas, with Texas tribes, in consequence of the sovereignty which the United States had acquired over them by the annexation.* It was not a treaty of

*There is no reason to believe that the United States failed to carry out the treaty of 1846, or that the encroachments of white settlers resulted from such failure. The treaty had nothing to do with the Indians' lands, and "the delay in the fulfillment" to which the Indian Commissioner referred in 1846 was merely due to the fact that the treaty was not finally ratified and proclaimed until March 8, 1847. The Commissioner's report does not refer at all to white settlement on the Indian lands in Texas, no such settlements having apparently yet been made, but it refers to the predatory excursions of the Indians into the country of the whites and the frequent murders and abductions of women and children committed by the former.

limits, because the lands occupied by Indians in Texas belonged to that State and not to the United States, but it differed from the treaties of 1835 and 1837 in providing that the United States should have the exclusive right to regulate trade and intercourse with the Indians, a right which could not exist in 1835 and 1837, when these Indians belonged on foreign soil. This treaty made no distinction between the Wichitas and the other Indians, a fact which shows conclusively that the former were regarded as Texas Indians, whether they all actually resided in Texas at that time or not.

In 1847 a special Indian agent for Texas was appointed, whose report of June 22, 1847, in regard to the recovery of stolen horses, states:

> On the 30th of May I arrived at the village of the Caddoes, Ionies, and Onadakoes, situated on the Brazos River, 45 miles from Torrey's trading house. * * * From the frequent depredations committed by the Wacos, Wichitas, Tah wah ca roos, and Keechies I found it necessary, at as early a day as possible, to give them my attention. * * * I determined, at all risk, to go to their village, and accordingly engaged the services of a small party of Delaware Indians—six in number—to accompany me.
>
> On application to the chief of the Onadakoes, he sent Pow iash, second chief, with six of his warriors with me. * * * On the 10th instant we arrived at the village of the hostile bands. * * * After much counseling among themselves, we were invited to a council in their village. * * * Our council lasted four days, during which time all matters of difference were discussed at length, and the following conditions agreed upon:
>
> * * * * *

In accordance with this agreement they delivered up 46 head of animals, which were all that were in the village, the larger portion having been driven to the main Wichita village, which is situated on the Witchita River. The chiefs present immediately dispatched men for the horses. * * *

The Caddoes, Onadakoes, Wacoes, Tah wah ca roos, Keechies, and Wichitas are making corn this year to a considerable extent. (Sen. Ex. Doc. No. 1, Thirtieth Congress, first session, pp. 894–896.)

According to this statement, the main Wichita village was on the Wichita River (i. e., the Big Wichita, of course, probably near its mouth, where the village is shown on De Cordova's map), while another village was near the Brazos. Counsel for the Wichitas insist that they lived on Cache Creek, near Mount Scott, at that time, but if any of them did, it could have been only a very few families.

Other communications from the agent in 1847–1850 refer to the Wichitas as living in Texas. In 1849 the Chickasaw agent reported the Wichitas and other Texas Indians as living in the western part of the Chickasaw country (Ex. Doc. No. 1, Thirty-first Congress, first session, p. 1130), but as Captain Catlett's report of that year (id., p. 968) states that they live "upon the Brazos, head of the Trinity, and upon the Big Wichita," a statement practically confirmed by Agent Neighbors's report (id., p. 963), it is evident that but few could have been living in the Chickasaw country.

Counsel for the Wichitas (brief, p. 44) cite Catlett's report as evidence that the Wichitas did not live in Texas in 1849. It is true that Catlett says that they did not rightly belong there, but his report shows clearly

that at least a very considerable portion of the tribe was there at that time, and not elsewhere. Some of the tribes mentioned by him (e. g., Creeks, Cherokees, Quapaws, Seminoles, Choctaws, Chickasaws, and a few others) could only have had a few members in Texas, and those as wanderers, but the Wichitas and Towash, together with the Caddoes, Annadarcoes, and Ionies, are declared to "have stated homes" there and to "cultivate the soil." (Same rept., p. 969.)

The agent's report of August 2, 1851, however, states that—

> The Wichitas, * * * together with about 80 warriors from the Caddoes, Wacoes, and Keechies (including about two-thirds of the latter tribe), together with a small proportion of women and children, have, within the last two years, left Texas, and are now inhabiting the Wichita Mountains beyond Red River. (Sen. Ex. Doc. No. 1, Thirty-second Congress, first session, p. 523.)

On July 19, 1852, Marcy passed the deserted Wichita village on Cache Creek, which he understood had been abandoned two years before, but it is likely that he was in error as to this. His failure to imagine why it should have been abandoned shows his ignorance of the roving habits of the tribe. Three days later he came upon the new Waco and Wichita villages on Rush Creek, built since the removal from Texas reported by the agent in 1851. He reported the Wichitas as "an insignificant tribe in point of numbers," being not over 500 souls.*

* Two years later he reported the population to be: Men, 80; women, 112; children, 122; total, 314. (Sen. Ex. Doc. No. 60, Thirty-fourth Congress, first session, p. 37.)

Ignorant of the fact that the Wichitas, or most of them, had been living in Texas until very recently, and impressed by their boasted origin from the womb of the Wichita Mountains, Marcy thought that their claim to the country was "guaranteed to them" by "the right of occupancy and possession;" but he added a grave "doubt if they have any claims upon the consideration or generosity of our Government, being the most notorious and inveterate horse thieves upon the border." (Sen. Ex. Doc. No. 54, Thirty-second Congress, second session, pp. 69, 72, 77.)

Counsel for the Wichitas (brief, p. 50) quote from the agent Capron's report of 1853 in support of the Wichita claim of original occupancy, but Capron's statements can not be received as evidence, being merely unsworn hearsay statements of what the Indians claimed to be a tradition, but which, even if true, would be irrelevant. An Indian claim of title to country to which the United States has at any time asserted title can only be supported by proof of continuous occupancy from before the time when the United States asserted title, so that no tradition of any prior occupancy can possibly affect the case. It is immaterial how long, if ever, the Wichitas occupied the country in question, unless they can prove that they did so, and by a valid title, in 1818, and that they have continued to do so ever since. This they have not done, and apparently can not do.

Capron's statement, moreover, is evidently that of a man ignorant of the real history of the Wichitas and their associates, and who has, therefore, been unable to test the truth of the alleged traditions. The Keechies,

Wacoes, and Tawakonies never had any villages north of the Red River before 1850, or thereabouts, and yet Capron seems to believe that they had really occupied the country, along with the Wichitas, from time immemorial. Of the actual facts with regard to the Wichitas and their various places of residence within historic times, Capron had obviously no knowledge whatever, and hence he assumed that their claim was what they represented it to be. He even seems to have adopted their statement that their country had been given to the Creeks and Cherokees, as well as to the Choctaws, although the least inquiry would have disclosed the error of such a statement. Neither Capron's nor Marcy's statements as to the supposed strength of the Wichita claim can, therefore, be received as evidence.

In the court below the counsel for the Wichitas quoted the opinions of the agents, Neighbors and Hill, in favor of a Wichita right of occupancy north of the Red River in 1854–55. (Secretary of Interior's Report, 1854, pp. 372, 373; 1855, pp. 180, 184.) The private opinion of these gentlemen, whose official duties gave them little time for historic research, can not give strength to the Wichita claim, which must be proved to a reasonable certainty by records contemporaneous with the alleged occupancy, or else the claim must fail altogether.

The northward movement of the Wichitas and some of their associates, in 1850 or thereabouts, was probably due to some extent to the failure of Texas to adhere to its early policy of reserving the Western portion of the State for the Indians. In 1854, however, Texas gave the United States twelve square leagues for Indian settle-

ment, and in 1856 five leagues additional. (Tex. laws, 1853–54, p. 51; 1855–56, p. 78.) Captain Marcy was ordered to survey the country and select the reservations in 1854, and the account of his expedition, written by one of his company, contains the following statements:

> We struck tents this morning and marched to Fort Belknap, where we camped for a short time, to procure stores and prepare for future work in locating and surveying lands for the Caddos, Ionies, Ah-nan-da-kas, To-wac-ko-nies, Wichitas, and Ton-kah-was, who exist in this neighborhood.
>
> * * * * *
>
> We arrived at Fort Belknap on the seventh [of September, 1854]. At a council held here the Ionies and Ah-nan-dah-kas were represented by Jose Maria, the Caddos by Ti-nah, the Wichitas and Wacos by O-che-ash and Aek-a-quash, and the To-wac-ko-nies by Utsiocks.
>
> * * * * *
>
> As far as could be ascertained, there are 80 Wichita men, 112 women, and 122 children. * * * They have a village up on Rush Creek, a tributary to the Washita, a kind of rendezvous for them, from which they make constant marauding expeditions. (Notes of Marcy's Expedition through unexplored Texas, by W. B. Parker, Phila., 1856, pp. 212, 213, 228, Rec., 128.)

Marcy's own report states that the Caddoes, "Ionies," and "An-dak-has" were living on the Brazos, but that the Wichitas (numbering 314 in all), "To-wock-o-nees," and Wacoes were on Rush Creek, whence they continually made forays into Texas. (Sen. Ex. Doc. No. 60, Thirty-fourth Congress, first session, pp. 36–37.) In 1857, however, some of them returned to Texas and had a village

near the mouth of the Big Wichita. (Rec., 262.) In 1858 the Wichitas took refuge at Fort Arbuckle, in the Chickasaw country, fearing the vengeance of the Comanches, who had suffered in an encounter with United States troops, and were supposed to believe that the Wichitas had induced the troops to attack them. (Sen. Ex. Doc. No. 2, Thirty-sixth Congress, first session, p. 584.) In 1854, as is evident from Marcy's report and Parker's notes, the Government's intention was to put the Wichitas and such of their associates as were with them back in Texas where they belonged, and to keep them on reservations there, but in 1855 it adopted the idea of securing for them a portion of the Choctaw and Chickasaw country, as stated in the brief for the United States in cases 337 and 339 (pp. 131–135, 260).

In pursuance of the latter policy, the Wichitas and all of the affiliated bands were removed from Texas and from Rush Creek in 1859, and were located within what is now the Wichita reservation. At that time, however, the Wichitas had clearly no more right to occupy any portion of the leased district than had their associates, who are conceded to have been Texas Indians, pure and simple. Under the treaty of 1835 they had, in common with several other tribes, a right to pass to and fro, and to hunt and trap, on so much of the Choctaw and Chickasaw country as lay west of the Cross Timbers, but no right to permanently occupy any portion of it to the exclusion of the other tribes, as by placing a village there. History shows that when they moved westward from Louisiana they first occupied villages on both banks

of the Red River, but afterwards on the Spanish side only, and that in the early part of this century, on account of the attacks of the Osages, they went farther west and settled on the Big Wichita. Before 1834 some of them, not all apparently, went to the Wichita Mountains, and afterwards there was a Wichita village on Cache Creek, but in 1847 their principal village was on the Big Wichita, and a smaller one near the Brazos. If any of them lived north of Red River continuously after 1835, which is merely a possibility, the tribe as such was very far from doing so. About 1850, however, the tribe left Texas and went to Rush Creek, but as intruders, not as rightful occupants of the soil.

In spite of the evidence of repeated changes of habitation on the part of the Wichitas, their counsel state (Brief, p. 30) that they "are certainly as sedentary as any of the tribes known to the whites." This statement is wholly unwarranted. The Six Nations of New York, for instance, tribes many times outnumbering the Wichitas at the latter's period of greatest population, have remained far more nearly in their original homes. Besides, all the real changes of residence of the sedentary tribes of the East have been due to wars with the whites or sales of land to them, or, in some instances, to the incursions of other Indians; whereas not one movement of the Wichitas down to 1859 can be traced to the action of white men, and only their original withdrawal from Louisiana was caused by an Indian attack. The Wichitas' repeated changes of residence can only be ascribed, therefore, to their being more nearly nomadic than the tribes of the East.

In the court below the counsel for the Wichitas relied on the speculations of scholars as to the home of the "Caddoan family," and on the Indians' statements of certain alleged traditions, more or less conflicting with each other, to the effect that the Wichitas had always occupied the leased district, from a period long anterior to the Quapaw cession of 1818.

The map accompanying the treatise on Indian Linguistic Families (Rept. of Bur. Ethn., 1885–86) shows the "Caddoan family" as occupying most of Louisiana, the western two-thirds of the southern half of Arkansas, eastern Texas, and the eastern three-quarters of the southern part of the Indian Territory, including the present Wichita Reservation, but only the extreme eastern part of the Wichita Mountains. The Caddoan family, however, comprised many other tribes besides the Wichitas, and the first actual record of the latter (Bienville, in 1700) is that they were on the Washita, in Louisiana. A map of this sort is necessarily speculative to a large degree, and can hardly be relied on seriously in support of the Wichitas' claim. It is interesting, however, as showing that, in the opinion of the maker (Mr. H. W. Henshaw, from notes of the late Rev. J. O. Dorsey; see deposition of F. W. Hodge, Rec., 55), neither the place where, apparently, La Harpe met the "Onsita" in 1719 nor the western part of the Wichita Mountains, where one legend says the Wichitas originated (Rec., 442), was Caddoan territory.

Although the records of French exploration show that the Wichitas were known to white men at least as early as 1688 (Rec., 94), counsel for the Wichitas, in support

of their theory that the present Wichita Reservation was included within the "pristine habitat" of the Wichitas, introduced, in the court below, various conflicting oral traditions. The first tradition is "that their original progenitor issued from the rocks of these [Wichita] mountains, and that the Great Spirit gave him and his posterity the country in the vicinity for a heritage, and here they continued to live and plant corn for a long time." (Sen. Ex. Doc. No. 54, Thirty-second Congress, second session, p. 69.) This tradition is about as credible as the next, which is that the tribe came to the region of the Wichita Mountains "before they knew of the existence of any white men." (Rec., 194.) It is submitted that such a tradition is not merely utterly irrelevant, in view of the evidence as to the movements of the Wichitas during the past two centuries, and especially since 1835, but wholly unreliable as well. Had the Wichitas been first found by white men in the country to which these alleged traditions relate, it is possible that a tradition that they had been there for some time might carry weight, especially if they had remained there for a long time within the knowledge of white men. As it is, however, they were first met with on the Washita River of Louisiana, where they seem to have remained (except for a short period when they were on the Canadian, near its mouth) until almost wiped out of existence by the Chickasaws. (Le Page du Pratz, Vol. II, p. 242, Rec., 98.) *Then* they went westward beyond the Cross Timbers, and with good reason, but previously they had not been known there, and it was not until 1834 that they were found in the "leased district" at all, and then nowhere near their

present reservation. The tradition therefore relates to a place of residence which they are supposed to have had more than two centuries ago, probably three or four centuries ago, for they must have known of the existence of white men before 1700, and presumably they had been some time in Louisiana before Bienville's journey. What value can attach to a supposed Indian tradition, on the part of a tribe at least seminomadic, as to where they lived 300 years ago, when the earliest record places them some distance from their alleged home?

Besides, there is no evidence that the alleged tradition is a Wichita tradition at all. Captain Scott admits that he has made no investigation as to the actual habitat of the Wichitas in 1820 or any other time. He has lived a few years among the Comanches, and he gives this tradition as he heard it from Comanches, not from Wichitas. Even if it were a tradition of the latter, it relates only to the country near the North Fork of the Red River, where Dodge and Catlin found the Wichita village in 1834. A very probable explanation is that it originated about that time, and was the invention, or dream, of some chief who wished either to give the tribe a motive for remaining in that particular spot or to give to other tribes a reason for the Wichitas being there. The tradition is entitled to the same respect as those of the Pukwana of the Peace-pipe, of Mudjekeewis and Hiawatha, and the other Indian legends which Longfellow has made world-known.

The next tradition is in no sense evidence, being an Indian interpreter's unsworn statement of what Uts-tutskins, a Wichita, had told him. It is that originally the

Wichitas lived near the Missouri, where men came in wagons and issued trinkets, etc., to them. These were, of course, white men, so that this tradition conflicts absolutely with that related by Captain Scott. After the visit of the white men, the Wichitas came south to the Comanche country, where they caught wild horses, then east to the Neosho, then west to the Salt Fork of the Arkansas, then south to the Red Hills on the North Fork of the Canadian, then to the mouth of Otter Creek, on the North Fork of Red River. There they divided into three bands, one remaining there, another going to the Red River near the Little Wichita, and the third going to the Clear Fork of the Brazos. Ultimately the first and third bands joined the second on the Red River, where Uts-tuts-kins was born, apparently about 1790. During his lifetime they went first to the mouth of Cache Creek, and afterwards to the mouth of Otter Creek. He remembered the visit of Dodge and Catlin's party in 1834. From Otter Creek they went to where Fort Sill is now, apparently about 1844, and afterwards to Rush Springs, apparently about 1850. (Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, p. 36.)

The statement of what took place in Uts-tuts-kins's lifetime is partly corroborated from other sources, but as contemporary records show that the Wichitas were in Texas from about 1836 to 1850, the accuracy of the statement has evidently suffered, either from Uts-tuts-kins's great age or from its having come through an interpreter. The tradition as to what took place before Uts-tuts-kins's birth conflicts not merely with the Comanche tradition, but, what is more important, with the French records.

It may have some truth in it, but how much it is utterly impossible to say.

A similar tradition is given by Mr. A. S. Gatchet in the American Antiquarian (Vol. XIII, p. 250, Rec., 221). He quotes a Tawakonie chief, Niastor, who was himself born about 1837, near Mount Scott, in the Wichita Mountains, and who said that his maternal grandfather was born (apparently between 1750 and 1770) on the Arkansas River below where the town of Wichita, Kans., now is. From there (where, Niastor said, "our people had always lived") the Wichitas went to the sand hills at the bend of the North Fork of the Red River, where the name Tawakonie, "bend in the river among red hills or sand hills," was given to a part of the Wichitas. Thence they went north of the Washita, near the mouth of Sugar Creek, in the southern part of the present Wichita Reservation; thence to the Wichita Mountains, where Niastor's mother was born, apparently between 1790 and 1800, as she died in 1872, "very old."

This tradition differs somewhat from all the others, though it is to the same general effect as that of Uts-tuts-kins. It conflicts with history, because at the very time when Niastor says the Wichitas were on the Arkansas they were found down in Texas fighting Parilla's troops, or living at peace after the visit of Padre Calahorra. There is no record, either from history or tradition, except Uts-tuts-kins's tradition of a temporary division of the Wichitas into three bands, that the Wichitas were divided, and even Uts-tuts-kins's story does not account for any such complete separation

as would have been the case if one branch of the tribe had lived on the Arkansas so long as to have the idea that it had always lived there, while another branch lived in Texas. Had this occurred, they would probably not have come together again except as foes, as was the case with the Pawnees and Wichitas after the latter had separated from the parent stock. (Grinnell, Pawnee Hero Stories, p. 226.)

Another fact showing the unreliable character of Niastor's tradition is that although he places the origin of the Tawakonies as a separate clan or tribe in his grandfather's lifetime, after the Wichitas left the Arkansas, between 1755 and 1775 apparently, the Touacaras, as the Spaniards called the Tawakonies, were among the tribes who attacked San Savàr in 1758 and were pacified in 1760. (Documentos, etc., Vol. I, p. 33, Rec., 203.)

Mr. Grinnell (Pawnee Hero Stories, pp. 215–231) appears to accept a tradition of the Wichita migrations akin to those of the Uts-tuts-kins and Niastor, but he is careful to give no dates and to say that "in the earlier accounts of this people the Pawnee Picts [French, Panis Piqués, i. e., tattooed Pawnees] or Wichitas are often confounded with their more northern relatives."

The traditions, if they are worthy of being received as evidence at all, which is very doubtful, are certainly, as Grinnell says of the Pawnee traditions (Pawnee Hero Stories, p. 223), "vague, and so lacking in detail as to be of little value except as suggestions which need confirmation before being accepted as having any solid basis of fact." They certainly represent the Wichitas to have

been far too migratory to entitle them to set up any claim of title by occupancy to any of the places which they successively occupied and deserted, and only one of these traditions (that of Niastor, which is particularly unreliable) states that the Wichitas ever occupied any portion of the present Wichita Reservation. It is futile even to speculate as to the origin of these alleged traditions, as their falsity is manifest. A portion, at least, of the Wichitas occupied a small part of the district west of the Wichita Mountains in 1834, having come there from the South, as they then admitted. Just how long they had then been there is uncertain, but among people like the Indians traditions grow rapidly when there is a motive for their growth; and although the tradition of continuous occupancy was not heard of in 1834 by Dodge, or even such a keen inquirer as Catlin, it is not surprising that it had fully developed by 1852, when Marcy first heard it, or that several others, differing from that told Marcy, but directed to the same conclusion, have developed since.

Even if the Wichitas, whom Marcy reported as numbering but 314 souls in 1854, had had a right of occupancy in the leased district, such right was necessarily limited to an extent of country suited to their numbers. This they certainly received, and the proof is that to-day, after allotting 160 acres to every man, woman, and child of the Wichitas and all their affiliated bands, there still remain about 574,000 acres of surplus land within the reservation, the Wichitas' proportionate share of which is about 95,000 acres. Their share of allotted and surplus

land together is from 122,000 to 125,000 acres. If that quantity of what is acknowledged to be good land, given in fee simple or to be sold for their benefit, does not sufficiently represent an Indian right of occupancy on the part of 153 to 175 people, or even the 314 reported by Marcy in 1854, it is hard to say what would be enough. If the line can not be fairly drawn at 122,000 to 125,000 acres, there is no reason for drawing it at any point.

THE CLAIM OF ALL THE DEFENDANT INDIANS TOGETHER TO THE ENTIRE "LEASED DISTRICT."

This claim, as stated at the beginning of this brief, has nothing to do with the Wichita claim of alleged original occupancy, being in fact antagonistic to it. It is based on a supposed understanding between the United States and the Wichita and affiliated bands in 1859. Had a treaty of limits ever been made with these Indians, it would be needless to inquire into this understanding, except where the meaning of the treaty was doubtful; but there being no treaty, it is necessary to examine all evidence tending to show precisely what rights in the "leased district" the United States may fairly be held to have granted to the Wichita and affiliated bands in 1859. As to this point, it is submitted that—

WHEN THE WICHITA AND AFFILIATED BANDS WERE REMOVED TO THE "LEASED DISTRICT" IN 1859, TWO SPECIFIC RESERVATIONS WERE ASSIGNED TO THEM, WITHIN WHICH THEY WERE REQUIRED TO REMAIN, BUT THEY WERE ALLOWED, WHEN PERMITTED BY THE AGENT, TO HUNT ON

> ANY PORTION OF THE DISTRICT NOT YET SPECIFICALLY ASSIGNED TO OTHER INDIANS. THE AREA OF THESE TWO RESERVATIONS WAS BUT SLIGHTLY MORE THAN ONE-FIFTH OF THAT OF THE RESERVATION ASSIGNED TO THEM IN 1872.

The idea of securing a portion of the Choctaw and Chickasaw country for the settlement of other Indians seems to have originated with Major Neighbors, supervisory agent for the Texas Indians, whose letter of February 5, 1855, suggests the acquisition of—

> a tract of land lying on the east side of the Red River (known as Cache Creek), near the Wichita Mountains, for the colonization of the Wichita Indians and such other prairie Indians as may be convenient to that location. (Sen. Ex. Doc. No. 13, 48th Cong., 1st sess., p. 15.)

The words "east side of the Red River," taken in connection with similar words ("the new reserve, east of Red River") in Neighbors' report of September 15, 1858 (Sen. Ex. Doc. No. 1, Thirty-fifth Congress, second session, vol. 1, p. 526), indicate that he supposed the North Fork of Red River to be the main stream, constituting the boundary between the Indian Territory and Texas, while the phrase "known as Cache Creek" seems to refer to the tract of land, so that the whole meaning is, "a tract of land lying on the east side of the Red River (known as the Cache Creek country)."* Whatever his precise meaning, however, Neighbors obviously referred

* The only other explanation is to supply the words "a branch of," so as to make the whole phrase read, "a tract of land lying on the east side of a branch of the Red River (known as Cache Creek)."

to but a small portion of what ultimately became the "leased district," yet he treated the use even of this small area as a matter to be determined by the convenience of the United States only.

Neighbors' suggestion was not merely adopted, but improved upon, the treaty of 1855 securing much more territory than he had suggested, and providing for settling thereon a large number of Indians described as follows:

> The Wichita and such other tribes or bands of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico and also those whose usual ranges at present are north of the Arkansas River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas. (11 Stats., 613.)

It can not be contended for a moment that these words applied only to the Wichita and affiliated bands, or that the United States was not entitled to settle upon the "leased district" every Indian, whether nomadic or not, who properly belonged south of the Arkansas and east of New Mexico, the boundary running at that time to the thirty-eighth meridian, i. e., practically to the Arkansas. The tribes whose permanent ranges were immediately south of the Arkansas were the Comanches, Kiowas, and Apaches, with whom the United States had made a treaty on July 27, 1853, wherein they are expressly described as "inhabiting the said [Indian] Territory south of the Arkansas River." (10 Stats., 1013.) Apparently the Southern Comanches and Apaches were regarded as distinct from those with whom the treaty of 1853 was made, but they were equally within the provision for the use of the leased

district. When that district was first leased it was not intended to place upon it the greater number of the affiliated bands, viz, the Anadahkos, Caddoes, Tawakonies, Wacoes, Tonkawas, and Penetethka Comanches, as they had but recently been placed on reservations in Texas, where they were doing fairly well, and the Texan hostility to them did not break out till the latter part of 1858. (See reports for 1855, Ho. Ex. Doc. No. 1, 34th Cong., 1st sess., pp. 330, 497–505.) These reservation Indians were, however, as much within the purport of the provision for the use of the "leased district" as were their wilder brothers in Texas, and ultimately the former were among the first who were placed within the district. Besides all these Indians, the Choctaws and Chickasaws still retained a right to settle in the district, though apparently none of them actually did so.

In addition to the terms employed in the treaty of 1855 in regard to the purpose for which the "leased district" was obtained, considerable light is thrown upon the subject by official reports and correspondence, as follows:

> By the convention referred to it is provided that the western end of the Choctaw country shall be opened to the permanent settlement of the Southern Comanches,* Wichitas, and such other Indians, within prescribed limits, as the United States may determine to locate therein. (Ind. Commr.'s Rept., Nov. 26, 1855, p. 329.)

*Wild Indians in the central and southern part of western Texas, numbering several thousands, not to be confused with the Penetethka Comanches, numbering about 277 in 1855, who had just been placed on a reservation in Texas, where they were expected to remain. (See same rept., p. 498.)

Should this be the case [i. e., should the treaty of 1855 be ratified], the way will be opened for the domestication of the wild savages who rove and plunder on the Grand Prairie, west of the Cross Timbers, as far north as the Arkansas River and west to New Mexico, sometimes extending their marauding expeditions into Texas, and even across the "Llano Estacado" to the Rio Grande and into Mexico.

* * * * *

The location affords great facilities for the subjection and control of the wild Indians of Texas and the plains south of the Arkansas. (Agent Cooper to Ind. Commr., Aug. 28, 1855; same rept., p. 473.)

The flattering success in Texas gives promise that by a similar policy the Southern Comanches, Wichitas, and other wandering bands near the northern frontier of that State may be successfully colonized on the western end of the Choctaw country, for which provision was made by the treaty of June 22, 1855, between the United States and the Choctaws and Chickasaws. (Ind. Commr.'s Rept., Nov. 22, 1856, p. 566.)

I perceive, by reference to your last annual report, that by a convention the western end of the Choctaw country should be thrown open to the permanent settlement of the Southern Comanches, Wichitas, etc. It is to be regretted that that measure has not been consummated. I have heretofore directed your attention to that subject. Those Indians have been in friendly intercourse with the Indians at this [Texas] agency; * * * they reside about 150 miles from this agency, on the east side of Red River. * * * There are also two bands of Comanches, viz, the "Noconee" and Tenawish (middle Comanches), who inhabit the same country and

are similarly situated. (Agent Neighbors to Commr., Sept. 18, 1856; same rept., p. 726.)

For the expenses of collecting and establishing the Southern Comanches, Wichitas, and certain other bands of Indians on reservations to be located south of the Arkansas River and west of the ninety-eighth degree of longitude, fifty thousand dollars. (Act of Mar. 3, 1857, 11 Stats., 169,183.)

Preliminary measures have been adopted for colonizing, as soon as possible, on the tract of country leased from the Choctaws and Chickasaws for the purpose, the Wichitas and other Indians intended to be located there.

* * * * *

This is the only practicable system for redeeming the wild, lawless, and roaming tribes within our borders. (Ind. Commr's Rept., Nov. 30, 1857, p. 296.)

Of Comanches, there are about 600 living on or near the one-hundredth degree west longitude. * * * It is understood, however, that they desire a reserve on the leased ground, and will locate there if such should be the wish of the Department. (Agent McKisick to Supt. Rector, Oct. 21, 1857; same rept., p. 549.)

Experience has demonstrated that at least three serious and, to the Indians, fatal errors have from the beginning marked our policy toward them, viz, their removal from place to place as our population advanced; *the assignment to them of too great an extent of country;* and the allowance of large sums of money, as annuities, for the lands ceded by them. * * * Our present policy, as you are aware, is entirely the reverse of that heretofore pursued in

the three particulars mentioned. It is to permanently locate the different tribes on reservations embracing *only sufficient land for their actual occupancy;* and to divide this among them in severalty, and require them to live upon and cultivate the tracts assigned to them.

* * * * *

I regret to state that no progress has yet been made in carrying out the provision in the act of March 3, 1857, for "collecting and establishing the Southern Comanches, Wichitas, and certain other bands of Indians on reservations to be located south of the Arkansas River and west of the ninety-eighth degree of longitude." Those Indians are wild and lawless in their disposition and habits, and can not be brought together without danger of difficulties occurring among themselves or of their committing forays upon the western Choctaws and Chickasaws. * * * A strong military force at the proper point in the region of country where it is intended to settle them is absolutely necessary to hold in check and control them, and to afford the requisite protection to the agent appointed to take them in charge. And until it shall be in the power of the War Department to furnish such a force for that purpose no successful efforts can be made to carry out the intention of the above-quoted provision. (Ind. Commr's Rept., Nov. 6, 1858, pp. 354, 355, 360.)

It is to be regretted that the General Government could not in [by?] this have consummated the contemplated policy of settling all the bands of Northern Comanches, Kioways, etc., on the new reserve, east of Red River. (Agent Neighbors to Commr., Sept. 16, 1858; same rept., p. 526.)

There are other considerations that would have induced me to extend our relations to every Indian that is roving west of the Chickasaws and Choctaws and south of the Canadian River. I will name one that appears to me sufficient. The [leased] district * * * is one of unusual fertility of soil and abounding in agricultural resources, being about 114 miles in breadth and 120 in length, and capable of sustaining a population of at least 1,000,000 people. This of itself was sufficient to convince me of the purpose of the Government, and I should have acted upon my convictions [as to locating the Kickapoos and Shawnees in the leased district] but for the reasons set forth in my report of December 1.

The extent of the country, its fertility, its capability of sustaining a dense population, contradict the position assumed, that it was intended alone for the Wichitas, Keechies, and a few other trifling bands, all of whom when collected and settled will not make up a population of more than 4,000. If the Kickapoos and Shawnees are denied the right of settlement, unless the Comanches when subdued are to be settled here, I would be at a loss to suggest a plan that would facilitate the object more than to take the tribes already named. (Rept. of S. A. Blain, agent to the Wichitas, etc., Jan. 15, 1859, Sen. Ex. Doc. No. 13, 48th Cong., 1st sess., p. 17.)

You will at the same time fix upon a suitable location for the Wichitas, and make such an examination of the country as will enable you to determine upon proper places for locating and colonizing the Texas and other Indians which it is intended to place within that district. In carrying out that policy the different bands, so far as they can not be united, are to be located upon distinct reservations, with cir-

> cumscribed limits, containing only as much land as may be necessary for their actual occupancy and use, it being the intention, as soon as it can be done, to divide the lands in the reservations into small parcels amongst them in severalty; and generally to carry out the plan laid down in the last annual report of this office in regard to colonization. * * *
>
> So soon as it may be practicable and safe for the Wichitas to remove to their new location, you will require them to go there, giving them to understand that it is to be their permanent home, and that none of them must leave their reservation without the permission of the agent. The same understanding must be impressed upon the other Indians. (Acting Commr. Mix to Supt. Rector, Mar. 30, 1859; same doc., p. 15.)

It is immaterial whether the words "the Texas and other Indians" refer only to those Indians whose immediate settlement upon the "leased district" had then been determined upon (i. e., those on the reservations in Texas, whom the Texans wished to get rid of, and the few Wacoes, Keechies, and Caddoes who were with the Wichitas), or whether they include all Indians who might from time to time be placed there, and for whose benefit it was desired that a number of suitable places for reservations should be selected in advance. Whether those words were used in the narrower or the broader sense, it is evident that there was no intention in 1859 of appropriating the "leased district" to the exclusive benefit of those Indians who were settled on it in that year. By Neighbors' report of May 2, 1859, the Indians then about to be taken there from Texas numbered 1,492 (Sen. Ex. Doc. No. 2, 36th Cong., 1st sess., vol. 1, p.

635), while those about Rush Creek certainly did not exceed 500. Altogether there may have been 2,000, while the "leased district," as Neighbors' letter of September 3, 1859, states, was "capable of sustaining a very dense population." (Same doc., p. 700.) Agent Blain's letter of January 15, 1859, stated that the "leased district" was "capable of sustaining a population of at least 1,000,000 people," meaning chiefly agriculturists, of course, and as it contains 7,713,239 acres his estimate was not too large, in view of the Government policy, announced in 1858, of giving the Indians no more land than they needed, and dividing it among them in severalty.

The same report of Neighbors, after giving statistics as to the tribes about to be removed from Texas to the "leased district," refers to the future settlement of other Indians there as follows:

> The Comanches [i. e., those from the small Comanche reservation in Texas, not the roving Comanches] would, of course, have to be located separate from the others, as I presume it will be the wish of the department to associate the more northern Comanches with them whenever they can be induced to settle down, and it was found by experience that they could not agree with the other Indians on the Texas reserve during our first experiment.

The person who primarily represented the United States in dealing with these Indians in 1859 was Elias Rector, superintendent of the southern superintendency, whose district included the lands in question. While he thought that a considerable part of the "leased district" was of little value for agriculture, and that the country

between the False Washita and Red rivers would have been a better selection (a country of just about the same area as the "leased district," but extending farther to the east and not so far to the north), yet he evidently realized that the Wichita and affiliated bands were not to have the entire district. In fact, in view of the numerous declarations of the officers of the department as to this, he could not possibly have supposed otherwise. His report of July 2, 1859, refers to the roving bands of Comanches and other prairie tribes, and to the desirability of inducing them "to settle with their brethren in the country selected for them and assigned to them." The words "their brethren" can only refer to the other Indians to which the report relates, those who were about to be located on the "leased district," especially as 300 or more of the Penetethka band, a portion of the Comanche nation, were among the Indians previously referred to. The words "the country selected for them" must have been used with reference to the country to which the report relates, and they indicate that the intention was to ultimately select portions of the "leased district" for the roving bands of the southern prairies, and to assign these portions to them.

Rector's idea was that, for the time being, the land in severalty plan was not feasible. He said:

> Each band, to make the present experiment—in which the good faith and honor of the United States are so much concerned—successful, must be put in exclusive possession of a much larger tract of country than is needed for cultivation, and when part of it has been inclosed be left to subdivide that part

> among themselves each year as the needs of each may require. * * * We have proceeded upon these principles in selecting the country to be occupied by these bands. * * * The plan of assigning to each head of a family his 40 or 80 acre lot, to be his own, would not succeed for a day or an hour. (Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, p. 22.)

Although Rector reserved for the Wichita and affiliated bands, then numbering about twice as many persons as at present, "a much larger tract of country than is needed for cultivation," the area of these reservations (one of 69,120 acres, in the northeast corner of the district, for the Wichitas and Keechies, and another of 85,120 acres, on the False Washita, for the Caddoes, Delawares, and other Texas Indians) was but a small portion, slightly over a fifth, of that included within the bounds as established in 1872. The map made at the time of Rector's report and reproduced in the document above cited is incorrect, placing the False Washita too far north and too near the Canadian, so that the reservation of 1872 is larger than it would appear if laid off between the two rivers on that map.

In view of the language of the treaty by which the "leased district" was acquired, of the repeated declarations of officers of the Government, including those two, Rector and Neighbors, who were concerned in placing the Wichita and affiliated bands there in 1859, and of the reservations actually made in that year, to which the Indians were to be confined, the contention that it was then understood between the United States and these Indians that the latter were to have the whole "leased

district" for themselves can not possibly be sustained. Rector and Neighbors knew too well that the district was intended for as many other Indians of the plains as could conveniently be placed there—to say nothing of the rights of the Choctaws and Chickasaws—to have given the defendant Indians to understand anything of the kind; and even if Rector and Neighbors had given them so to understand, they would have wholly exceeded their authority, and the United States would not have been bound thereby.

In the case of an Indian treaty, where something is surrendered by Indians in consideration of benefits promised by the United States, and the Indians are an ignorant, unlettered people, the language used must never be construed to their prejudice (*Worcester* v. *Georgia*, 6 Pet., 515, 582); but there was no treaty in 1859, nor did the defendant Indians then surrender anything worth speaking of to the United States. The Indians from the Texas reservations, about three-fourths of the whole number, abandoned those reservations to Texas, not to the United States, and they did so to save their lives, the Texans being bent upon their extermination. The United States not merely removed them and supplied them with food, but gave them larger reservations than the twelve square leagues they had in Texas. The remaining fourth, the Wichitas and the few others with them, had no legitimate home at all, nothing but a bare right to hunt and trap on the Great Prairie in company with hostile Comanches, Kiowas, and Apaches, and many other tribes. This right they may be considered to have surrendered when they consented to go

on a reservation and stay there, but they surrendered nothing else. What the United States gave to the Wichita and affiliated bands in 1859 was therefore practically a free gift, and hence the only question can be, How much were Rector and Neighbors authorized to give? If the Indians thought that more was given, their impression was wholly immaterial.

Counsel for the Wichita and affiliated bands wish to treat as evidence two statements (brief, pp. 70–72), made since 1883, in regard to what Rector and Neighbors had said in 1859, twenty-four years before. The jurisdictional act gives great liberty as to what shall be received as evidence, but it is submitted that upon this particular issue such *ex parte* statements as these can not be received, and even if they could they would be wholly irrelevant, for the reason above stated; while if both competent and relevant, they would still be incredible on any other theory than that Rector and Neighbors deliberately lied to these Indians as to the extent of country they were to have. Such a course would have been without motive, however, for the Indians were evidently only too glad to have a lawful, permanent home somewhere, and be free from the attacks of the Texan, Choctaw, and Chickasaw claimants of the soil they had formerly occupied, without inquiring too closely as to the precise area of the reservations granted them.

These statements, moreover, are evidently based on the theory that the Wichitas, and apparently their Texan associates as well, were entitled to exclusive possession of the "leased district" as a portion of the country

which they had always occupied. It has been already shown that this theory has no real foundation in fact, even as regards the Wichitas, and certainly there is no indication whatever that the United States ever paid any regard to it. The fact that a Government astronomer, employed to locate the 98th and 100th meridians, made a map of the leased district in 1858, writing across it the words "Leased country for Caddoes, Wichitas, Keechies," and that an army officer transmitted this map to the War Department, with a letter alluding to the district as the "country within the two degrees leased for the Wichitas" (Rec., 248-251), can hardly be received as binding the Government to devote the whole district to those particular tribes. It is easy to see how Mr. Majors and Major Emory came to speak of the country as they did. The Wichitas, with a few Caddoes, Keechies, and Wacoes, had for a few years settled themselves on land supposed to be within the "leased district," but which Mr. Majors discovered to lie to the east of it. It was clear that they would have to be moved to the district, but no other Indians were settled there then, although the money to settle the Southern Comanches there had already been appropriated. Up to that time, therefore, the Wichitas were more identified with the district than any other tribe was, and hence the prominence given to their name. It can hardly be supposed that Mr. Majors and Major Emory *intended* to assert that the whole district was to be appropriated to the use of the few hundred Wichitas, Caddoes, Keechies, and Wacoes who chanced to be the first whom it was determined to place there.

The most reasonable statement produced in support of the defendant Indians' claim is that of H. P. Jones, in an affidavit made February 21, 1883, as follows:

> I heard Major Nabors [Neighbors] tell the Indians in a general way that their country extended from the Canadian to Red River, and west a long distance; that it was a big country, and the Government would some day want the plains Indians to live with them, and that they were all to be friends and settle and share the country with them. (Affidavit of H. P. Jones, Feb. 20, 1883, Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, p. 37.)

This probably approaches a fair general statement of what Neighbors told the Indians when they were all gathered on the False Washita in August, 1859, prior to their location upon the two reservations selected for them by Rector. What Neighbors really said may be presumed to be that the Government had secured a large country, extending "from the Canadian to the Red River, and west a long distance," for permanent homes for them and the plains Indians, who had no reservations; that the Choctaws and Chickasaws had a right to settle there also, and that all the Indians who were or should thereafter be settled in the district were to be friends, and to share together whatever common hunting grounds the Government should retain for them outside the particular reservations. Such a statement would have about covered all that Neighbors could lawfully say, and anything more would have been false, to his own knowledge.

At all events, what the evidence shows is that the Government undertook, in 1859, to give to the Wichita

and affiliated bands, for their occupancy, both for farming and grazing, the particular reservations then established, containing 154,240 acres, and nothing more, but that they were allowed to hunt, when permitted to leave the reservations for that purpose, on any land within the district not yet specifically assigned to other Indians.

The Wichita and affiliated bands fled to Kansas during the rebellion, and did not return till August, 1867, apparently to the same reservations. (Ind. Commr.'s Rept., 1867, p. 23.) The "Camanche and Kiowa" treaty of October 18, 1865, proclaimed May 26, 1866 (14 Stats., 717), provided that a district bounded by the New Mexico line, a line from the southeast corner of New Mexico to the mouth of the North Fork, the Red River to the 98th meridian, that meridian to the Cimarron, that stream to the Kansas line, and the Kansas line to the New Mexico line, "or such portion of the same as may hereafter from time to time be designated by the President of the United States for that purpose," should be "set apart for the absolute and undisturbed use and occupation of the tribes who are parties to this treaty and of such other friendly tribes as have heretofore resided within said limits, or as they may from time to time agree to admit among them." This district included the entire leased district; and ultimately the present Kiowa and Comanche Reservation was established within that district by the treaty of October 21, 1867, proclaimed August 25, 1868. (15 Stats., 581.) The Cheyenne and Arapahoe Reservation, disposed of by the act of March 3, 1891, § 13 (26 Stats., 1022), was sim-

ilarly carved out of the leased district by Executive order of August 10, 1869.

The setting off of these two reservations definitely established the southern and western boundaries of the Wichita Reservation, which was already bounded on the east by the Chickasaw Nation and on the north by the Seminole cession of 1866. In 1872 the following agreement was executed:

> Articles of agreement made and concluded at Washington City, District of Columbia, this nineteenth day of October, A. D. 1872, by and between Francis A. Walker, Commissioner of Indian Affairs, representing the United States, of the one part, and the undersigned chiefs, headmen, and members of the Wichitas and affiliated bands of Indians duly authorized to act for their people, of the other part, witnesseth:
>
> ARTICLE 1. The United States hereby give and grant to the said Wichitas and other affiliated bands, for a home, the tract of country bounded as follows, to wit: Commencing at a point in the middle of the main channel of the Washita River where the ninety-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of 98° 40′ W. L., thence on said line of 98° 40′ due north to the middle of the main channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the ninety-eighth meridian, thence due south to the place of beginning.
>
> ARTICLE 2. In consideration of the reservation provided for in the preceding article the said Wichitas and other affiliated bands hereby cede and relinquish to the United States all right, title, interest,

or claim of any nature whatsoever in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States. (Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, p. 56.)

The only practical effect of this agreement at the time was to put on record an official recognition of the bounds of the Wichita Reservation, the agreement itself never having been ratified by Congress, and having been repudiated by some, at least, of the Indians, who claimed that it was signed under compulsion by delegates who had no authority to bind the bands to such an agreement. At the same time there can be no doubt that it represented an absolutely fair settlement of all matters in controversy between the United States and the Indians. The northern, eastern, and southern boundaries of the reservation were the same as they had been ever since the Indians were settled there, and the western boundary did not exclude any land that they had previously occupied. The words "give and grant * * * for a home" clearly indicated that the Indians were to have the full enjoyment of the whole tract. On the other hand, while the Indians had, strictly speaking, no "right, title, interest, or claim of any nature whatsoever, in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States," all land outside the reservation having long ago been abandoned, yet as they had abandoned their lands in Texas on account of the promise of a permanent home in the Indian Territory, they would, had that home not been given them, have had a claim on the United States

growing out of such abandonment. Under these circumstances their quitclaim, even if not essential, was a proper thing, especially in view of the tenacity with which Indians cling to the idea that a country once occupied by them is always theirs, no matter how long ago they may have abandoned it.

Had the agreement of 1872 ever been ratified by Congress, then there could be no doubt as to the right of the Wichitas and affiliated bands to the proceeds of the surplus lands; but even as it is, the agreement expresses so exactly the substantial understanding of both the United States and the defendant Indians at the time the latter were brought to the reservation, that it indicates what the decree of the court below should have been in the present case, viz, that the Wichita and affiliated bands should have a judgment for the proceeds of all the land on the reservation not allotted to them in severalty, to be paid in accordance with the provisions of the jurisdictional act, on condition that the Wichita and affiliated bands should first, and before such judgment should take effect in their favor, execute a full and complete release and quitclaim, in such form as the court may direct, of all right, title, interest, or claim of any nature whatsoever, in and to any lands in Texas, Louisiana, the Indian Territory, Oklahoma Territory, or elsewhere within the limits of the United States, other than the land allotted to each individual.

To give a judgment for the proceeds of the lands without requiring such a quitclaim would be obviously unjust to the United States, for, although the Wichita and affiliated bands have no valid claim for any land outside the

Wichita Reservation, yet it does not follow that they may not in the future come before Congress with some colorable demand for further compensation, and the United States has a right to be protected against such demands. It is entirely within the jurisdiction of the court below to require such a quitclaim, the jurisdiction over the present suit having been expressly given "so that the rights, legal and equitable, of *the United States* and the Choctaw and Chickasaw Nations and the Wichita and affiliated bands of Indians in the premises shall be fully considered and determined, and to try and determine *all questions that may arise on behalf of either party* in the hearing of said claim."

Ever since the agreement of 1872 was executed the Wichita Reservation, with the bounds stated in the agreement, has been kept for the use of the Wichita and affiliated bands, and Congress has made annual appropriations for their support on that reservation. As it is nearly five times the size of the reservation originally set off in 1859, its appropriation to their use manifested no small liberality on the part of the United States. This was done, however, in consideration of the express agreement of the delegates of the Wichita and affiliated bands, representing themselves as "duly authorized to act for their people," to relinquish to the United States all claim to lands elsewhere within its limits. Unless a judgment be made which will carry into effect that feature of the agreement, then the only judgment that can be justly rendered in favor of the Wichita and affiliated bands is for so much of the scrip provided for by the act of March 2, 1895, as will cover the proceeds of the sale of as many

acres of land (154,240) as were actually set apart for them in 1859, less the acreage required for their allotments; and judgment for the balance of the proceeds of the sale of the reservation lands should be rendered in favor of the United States.

It is therefore submitted, both for the reasons above specified and for those set forth in the brief for the United States in cases Nos. 337 and 339, that the decree of the court below should be reversed and set aside and the cause remanded to the said court with directions to enter a decree dismissing the petition of the Choctaw Nation and the Chickasaw Nation, and ordering the allotment of 160 acres of land in the Wichita Reservation to each member of the Wichita and affiliated bands, in accordance with, and under the restrictions of, the agreement of June 4, 1891, and also ordering the proceeds of all sales of the unallotted portion of the said reservation to be disposed of for the benefit of the said Wichita and affiliated bands in accordance with the provisions of section 6 of the act of February 8, 1887 (24 Stats., 388), commonly called the "Dawes land in severalty act," and further ordering the said Wichita and affiliated bands to execute a release to the United States of all right, title, interest, and claim, of any nature whatsoever, in and to any lands within the limits of the United States, except those allotted to them.

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